Supreme Court, U.S.
FILED

No. 941500 FEB 9 - 1995

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In the SUPREME COURT of the UNITED STATES OF AMERICA

October Term, 1994

Bonnie Ann F., by her next friends John R. and Karen A. F.,
Petitioner
v.
Calallen Independent School District,
Respondent

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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Questions for Review

1. Whether or not Calallen Independent School District (CISD) provided Bonnie Ann F. a free appropriate public education (FAPE) as required by 20 USC § 1400, et seq., also known as the Individuals with Disabilities Education Act (IDEA).
2. Whether the lower courts erred in not finding that Bonnie was entitled to immediate provision of needed services as required by 34 CFR § 300.342.
3. Whether or not CISD denied Bonnie equal protection under the law as required by the 14th Amendment to the U.S. Constitution.
4. Whether or not CISD denied Bonnie an education in the least restrictive environment (LRE) as required by 20 USC § 1412(5)(B) and 34 CFR § 300.550.
5. Whether or not CISD had available a continuum of alternative placements to meet Bonnie's individual educational needs as required by 34 §CFR 300.551.
6. Whether or not Bonnie's placement in education with sign language was made on an individual basis as required by 34 CFR § 300.349.
7. Whether or not CISD met the standard for education of hearing impaired students set by the state of Texas in Texas Education Code (TEC) 11.10(o)(6), particularly with regard to its requirements for evaluation of oral capabilities and use of the best methods of communication as well as its clear preferences for different placements based upon an individual child's oral abilities and for education without sign language whenever possible.
8. Whether or not CISD offered an educational placement for Bonnie that was "as close as possible to the child's home" as required by 34 CFR § 300.552(a) and (c).
10. Whether the lower courts denied due process under 20 USC § 1415(e)(2) by failing to consider additional evidence offered to the District Court.
11 Whether or not the District Court erred in imposing sanctions upon plaintiffs instead of solely upon plaintiff's attorney.
12. Whether or not the District Court abused its discretion in imposing sanctions with respect to Rule 16.

List of All Parties to the Proceeding

Bonnie Ann Fritch, Karen Ann Fritch, and John Robert Fritch	Petitioner
Clyde L. Wright III	
Calallen Independent School District	Respondent

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Opinions Delivered in This Case

1. August 2, 1991 Decision of the State of Texas's Special Education Hearing Officer in Docket No. 203-SE-391. Whether or not this decision was published is unknown.
2. August 29, 1991 Corrected Order on Petitioner's Motion for Rehearing, the final decision of the hearing officer. Whether or not this decision was published is unknown. A copy is not available to the petitioner.
3. Bonnie Ann F. vs. Calallen Independent School District, 835 F.Supp. 340 (S.D. Tex. 1993)
4. Unpublished November 11, 1994 final decision of the U.S. Court of Appeals for the Fifth Circuit in Appeal No. 93-7641

Jurisdiction in the Supreme Court

The final decision of the U.S. Court of Appeals for the Fifth Circuit in this case was entered November 11, 1994. 28 USC § 1254(1) permits Supreme Court review of that decision by Writ of Certiorari granted upon petition. This petition is timely filed on February 9, 1995.

Constitutional Provisions, Statutes, and Regulations

U.S. Constitution, 14th Amendment

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

20 USC § 1401(18) The term "free appropriate public education" means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required

under section 614(a)(5) [20 USCS § 1414(a)(5)].

20 USC § 1412 In order to qualify for assistance under this part in any fiscal year, a State shall demonstrate to the Secretary that the following conditions are met:
(1) The State has in effect a policy that assures all handicapped children the right to a free appropriate public education.
(2)(B) a free appropriate public education will be available for all handicapped children between the ages of three and eighteen within the State not later than September 1, 1978, and for all handicapped children between the ages of three and twenty-one within the State not later than September 1, 1989, except that , with respect to handicapped children aged three to five and aged eighteen to twenty-one, inclusive, the requirements of this clause shall not be applied in any State if the application of such requirements would be inconsistent with State law or practice, or the order of any court, respecting public education within such age groups in the State.
(5) The State has established **(B)** procedures to assure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily

20 USC § 1415(e)(2) Any party aggrieved by the findings and decisions made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph

the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

34 CFR § 300.7
(3) "Deafness" means a hearing impairment that is so severe that the child is impaired in processing linguistic information through hearing, with or without amplification, that adversely affects a child's educational performance.
(4) "Hearing Impairment" means an impairment in hearing, whether permanent or fluctuating, that adversely affects a child's educational performance but that is not included under the definition of deafness in this section.

34 CFR § 300.341 State educational agency responsibility.
(a) Public agencies. The State educational agency shall insure that each public agency develops and implements an individualized education program for each of its handicapped children.

34 CFR § 300.342 When individualized education programs must be in effect.
(a) On October 1, 1977, and at the beginning of each school year thereafter, each public agency shall have in effect an individualized education program for every handicapped child who is receiving special education from that agency.
(b) An individualized education program must:
(1) Be in effect before special education and related services are provided to a a child; and
(2) Be implemented as soon as possible following the meetings under Reg. 300.343.
(20 USC 1412(2)(B), (4), (6), 1414(a)(5); Pub. L. 94-142, Sec. 8(c) (1975))

Comment. Under paragraph (b)(2), it is expected that a handicapped child's individualized education program (IEP) will be implemented immediately following the meetings under Reg. 300.343. An exception to this would be (1) when the

meetings occur during the summer or a vacation period, or (2) where there are circumstances which require a short delay (e.g., working out transportation arrangements). However, there can be no undue delay in providing special education and related services to the child.

Policy Interpretation 4. How much of a delay is permissible between the time a handicapped child's IEP is finalized and when special education is provided? In general, no delay is permissible. It is expected that the special education and related services set out in a child's IEP will be provided by the agency beginning immediately after the IEP is finalized. The comment following Reg. 300.342 identifies some exceptions ((1) when the meetings occur during the summer or other vacation period, or (2) when there are circumstances which require a short delay, such as working out transportation arrangements). However, unless otherwise specified in the IEP, the IEP services **must** be provided as soon as possible following the meeting. (NOTE: Reg. 300.346(d) requires that the IEP include the "projected dates for initiation of services.")

34 CFR § 300.343(a) General. Each public agency is responsible for initiating and conducting meetings for the purpose of developing, reviewing, and revising a handicapped child's individualized education program.

34 CFR § 300.349 Individualized education program -- accountability. Each public agency must provide special education and related services to a handicapped child in accordance with an individualized education program. However, Part B of the Act does not require that any agency, teacher, or other person be held accountable if a child does not achieve the growth projected in the annual goals and objectives.

34 CFR § 300.550(b) Each public agency shall insure:
(1) That, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and

(2) That special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

34 CFR § 300.551 Continuum of alternative placements.
(a) Each public agency shall insure that a continuum of alternative placements is available to meet the needs of handicapped children for special education and related services.

34 CFR § 300.552 Placements.
Each public agency shall insure that:
(a) Each handicapped child's educational placement:
(1) Is determined at least annually;
(2) Is based on his or her individualized education program; and
(3) Is as close as possible to the child's home.
(b) The various alternative placements included under Reg. 300.551 are available to the extent necessary to implement the individualized education program for each handicapped child;
(c) Unless a handicapped child's individualized education program requires some other arrangement, the child is educated in the school which he or she would attend if not handicapped

Texas Education Code § 11.10(o)(6) Recognizing the need for development of oral communications abilities in deaf children and the ability of many to achieve high educational excellence through that method, but also recognizing the inability of some to gain their education successfully by this means, the comprehensive plan developed by the director of services to the deaf will call for the use of methods of communication which will best meet the needs of each individual deaf child in this state, with each child to be examined thoroughly so as to ascertain his potential for communications through oral means. The director of services

to the deaf may establish separate programs to accommodate diverse communication methodologies.

Rule 16 of Civil Procedure

(f) Sanctions. If a party or party's attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party's attorney is substantially unprepared to participate in the conference, or if a party or party's attorney fails to participate in good faith, the judge, upon motion or the judge's own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b(2)(B),(C),(D). In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing the party or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

Statement of the Case

A. Background. This case arises under the Individuals with Disabilities Education Act (formerly the Education of the Handicapped Act, hereinafter referred to as the "IDEA"), 20 U.S.C. § 1400 et seq. It is stipulated between the parties that Bonnie Ann F. is a hearing impaired child entitled to the protection of the IDEA. Bonnie Ann F. is a child who has resided in the Calallen Independent School District (CISD) her entire life. On May 3, 1989, less than three weeks short of her second birthday, she was diagnosed as having spinal meningitis, which left her profoundly deaf. Bonnie began receiving assistance from CISD through the Corpus Christi Regional Day School for the Deaf (RDSD) starting in August, 1989. That assistance included the teaching of sign language. In mid-March, 1990, Bonnie received a cochlear implant, which was activated on April 28, 1990, one month short of her third birthday. From August, 1990 through March, 1991, Bonnie attended RDSD's class for three- and four-year-olds at the Calk Elementary School, about 25 miles from Bonnie's home. In that class, which was taught by Ms. Jasper, the emphasis

on sign language instruction continued. By December, 1990 to January 1991, it became apparent that with her cochlear implant, Bonnie could hear and learn to speak as her exciusive means of communication, and that further use of sign language was neither necessary nor appropriate.

Admission, Review, and Dismissal (ARD) meetings were held in February, 1991 to revise Bonnie's Individualized Education Plan (IEP) and to consider the request of Bonnie's parents to remove the distraction of sign language from Bonnie's education. Because that request was denied, Bonnie's parents filed a petition for review of the ARD committee's decisions and unilaterally placed Bonnie at Sunshine Cottage in San Antonio, where she received appropriate auditory training and speech therapy integrated with language development in the absence of sign language.

B. Jurisdiction in the U.S. District Court. Plaintiff, Bonnie Ann F., by next friends and parents, Mr. and Mrs. F., sought an administrative hearing to contest a decision of the School District's Admission, Review and Dismissal (ARD) committee of February 28, 1991. The administrative hearing was held on May 17, 1991. The final decision of the Hearings Officer was the August 29, 1991 Corrected Order on Petitioner's Motion for Rehearing, which upheld the decision of the School District. Plaintiffs appealed that decision to the United States District Court, Southern District of Texas, Corpus Christi Division, by filing Plaintiffs' Original Complaint and Petition for Trial De Novo on September 26, 1991. Jurisdiction was proper in that Court pursuant to 20 U.S.C. §§ 1415(e)(2) and (4)(A).

The District Court issued its final judgment disposing of all claims with respect to all parties on September 20, 1993, finding for the Defendant, Calallen Independent School District. From this final judgment Appellants appealed to the U.S. Court of Appeals for the Fifth Circuit.

Appellants filed their notice of appeal with the Clerk of the United States District Court timely on September 30, 1993. Jurisdiction was proper before the U.S. Court of Appeals for the Fifth Circuit pursuant to 28 U.S.C. § 1291.

C. Bonnie's Capabilities. Although still hearing-impaired, Bonnie has been very far from deaf since her Nucleus 22 MSP cochlear implant was energized on April 28, 1990.

Bonnie's audiograms all show Bonnie's hearing with the cochlear implant to be at or above average speech intensity across the 250-4000 Hz speech spectrum, consistent with her hearing and understanding of speech introduced at 30 dB, which is softer-than-average speech intensity.

Relying solely on the aural input of her Nucleus 22 cochlear implant and without visual cues such as sign language or lip reading, Bonnie could, during February, 1991, repeat and understand sentences as long as six words, correct her own articulation errors to produce understandable speech, understand and execute multistep oral instructions, and successfully select items from a field of at least 30 when names of the items were spoken. Bonnie's spontaneous spoken expressions averaged about four words in length and were contextually relevant. All with just auditory perception and without visual cues. In view of the foregoing, Bonnie is correctly characterized as hard of hearing and not as deaf.

D. Bonnie's Educational Needs. During a period including February-August 1991, Bonnie's primary educational need has been development of spoken English language skills through auditory training and speech therapy, both integrated with language development, all with spoken English and without sign language. Since no later than February, 1991, Bonnie has had no need for sign language, and since no later than April 1, 1991, has used spoken English without manual signs as her preferred and substantially exclusive means of communication. During this period without sign language, Bonnie's proficiency in oral communication has grown at a rate several times the rate at which she had been acquiring sign language while enrolled at RDSD and at a rate which his allowed her to socialize and to be educated successfully with non-handicapped children of her age within mainstream environments at school, at church, and in neighborhood homes. Prior to February, 1991, use of sign language had prevented any such progress.

CISD and RDSD conceded that Bonnie had no need for sign language during the contested period of April and May, 1991. In an evaluation carried out on April 30, 1991 for and at the request of CISD, Elise Hoaglund found that Bonnie had no need for sign language. In Ms. Hancock's March, 1991

letter, CISD and the ARD committee admitted that "an auditory-oral model would be the methodology which would best meet Bonnie's current needs." That the auditory-oral model excludes sign language is well established (District Court Finding 20).

Since her August 8, 1991 ARD, CISD has educated Bonnie without sign language. She is presently successfully mainstreamed on grade level in regular education. With such education, CISD has clearly conceded that Bonnie has had no need for sign language and has used spoken English without manual signs as her preferred and substantially exclusive means of communication since August 8, 1991.

E. <u>The Inappropriateness of Manual Language</u>

E.1 <u>Manual signs are not a representation of English</u>. The education offered by CISD was placement at the Regional Day School for the Deaf (RDSD), where communication is accomplished with manual signs used by both teacher and student. The system of manual signs used by RDSD consists of about 2600 signs. A "dictionary" of these signs is part of the record. There are no manual signs for the other 65,000 words in the College Edition of the Random House Dictionary. At least 148 of the individual manual signs have been identified in the record as representing more than one English word. Furthermore, many English words have different manual signs for different meanings of the English word, and over 300 manual signs have been identified in the record as contributing to this problem. When a manual sign is used to represent more than one English word and another manual sign is also used to represent one of those English words, it is almost always the case that neither manual sign is a true representation of either English word. This insidious situation was identified in the record for at least 138 English words. At least 63 sign phrases were identified in the record as having component manual signs which do not correspond to the manual signs (if any) of the individual words of the phrase's English translation. The term "Signed English" is therefore a fraudulent misnomer for a sign language which is in fact different from -- rather than a one-to-one representation of -- English.

E.2 Manual signs do not assist teaching of speaking, reading, and writing English. There is no theoretical rationale for how manual signs could possibly assist teaching of spoken English. Spoken English is taught by teaching spoken English, not by teaching sign language, semaphore, Chinese, Swahili, or any language other than English. If sign language or semaphore were helpful in teaching English, why is it not being used to teach English to immigrants? Sign language or semaphore is obviously of no help in teaching an American Swahili, and is of no better help in teaching Bonnie English.

The only rationale CISD and other proponents of TC offer for their use of sign language is that it provides a first native language from which English might be taught as a second language. However, Bonnie's educational need is to learn the mainstream language -- English -- as her first and native language. Bonnie has no need to learn sign language as a first or even a second language.

The phonetic construction of written English is the basis upon which English writing and speech are interconverted and the basis upon which speaking people learn to read and write English. Without the ability to speak English, that basis for reading and writing English is lost. There is not even a one-to-one correspondence -- let alone a constructive relationship -- between written English and the sign language erroneously alleged to be a "Signed English."

E.3 Manual signs deter teaching of speaking, reading, and writing English. Teaching any language other than English is not only irrelevant to the more important process of teaching spoken English, but in fact impedes that more important process by "cognitive overload," i.e., by diverting concentration, energy, and resources away from learning spoken English. The use of manual signs in fact impeded Bonnie's use of spoken English. A scientific study in the record demonstrated that the spoken English capability of profoundly deaf children educated in a non-sign language environment not only greatly exceeded the spoken English capability but even exceeded the *combined* oral and sign capability of profoundly deaf children educated with manual signs. The gap between oral and signing children would be

expected to widen with hearing losses less than profound, because oral children rely on aural input far more heavily than signing children do.

An independent scientific study in the record also found the spoken English capability of profoundly deaf children educated in non-sign language environments to be significantly greater than that of profoundly deaf children educated with manual signs. An earlier study in the record reached the same conclusion.

Studies in the record have also shown that the ability to read and write English is determined by proficiency in spoken English more than by anything else. For the hearing impaired educated with manual signs, reading and writing abilities, on average, fail to progress beyond a third to fifth grade level, even in the absence of non-auditory impairments. In contrast, the *profoundly deaf* that have spoken English as their only language read, on average, at an eighth grade level, with 30% at or above the grade level corresponding to their age. For the *slightly or moderately hearing impaired* having spoken English as their only language, reading, writing, and speaking abilities are undoubtedly even higher. An earlier study in the record reached a similar conclusion.

E.4 "Total Communication" is Unworkable. "Total Communication" (TC) is the politically correct oxymoron used to mischaracterize the simultaneous and synchronous use of speech and manual signs attempted by RDSD and the majority of public education programs for the hearing impaired. While seeking to please everyone in its attempt to teach both English and sign language simultaneously, TC in fact fails to teach English and does only a poor job of teaching sign language. One of TC's erroneous assumptions is that simultaneous and synchronous presentation of speech and manual signs can be successful in practical, everyday life at school and home. This has not been the case in RDSD's and most other TC programs. "Total Confusion" is often a more accurate characterization of efforts referred to as "Total Communication."

Studies in the record have shown that teaching hearing impaired students English has auditory training and speech therapy as its two most critical elements, and unless both are

pursued aggressively and competently, teaching of English will fail. In TC programs such as RDSD where resources are diverted to use of manual signs, the resources left over for auditory training and speech therapy are simply inadequate to teach spoken English. None produces children who speak, or, when forced to use their voices, produce intelligible utterances. None produces students who are free from dependence on sign language or who can read beyond an elementary school level.

Cognitive overload apparently works both ways. One sign language proponent called upon teachers to "adapt to signs other than signed English and to reduce the use of voice. We believe that using voice has interfered with the quality of signing. People have noticed that the students understand better if voice is not used."

F. RDSD Methods and Results

F.1 Auditory training. Auditory training is one of the two most critical elements in teaching hearing impaired students English. In spite of this fact, the auditory training portion of Bonnie's IEP was nothing more than a denial of her capability to communicate orally and was clearly irrelevant to further development of Bonnie's English language skills.

During the litigation after the February 28, 1991 ARD, CISD and RDSD were shown which auditory training goals would further develop Bonnie's spoken language and which would not. Only with the benefit of this information were CISD and RDSD able to proceed with their shameless attempt to "amend" Bonnie's auditory training IEP *during* the due process hearing. This attempt is CISD's clear admission that its February 28, 1991 auditory training IEP goals had absolutely no relevance to Bonnie's further development of spoken language, and that CISD and RDSD were incompetent to identify appropriate auditory training IEP goals. Regardless of how much auditory training was allegedly "incorporated into activities throughout the day," such "auditory training" is worthless when provided by those who have no concept of what appropriate auditory training goals should be. The same applies to speech therapy.

F.2 Speech therapy. Speech therapy is the other of the two most critical elements in teaching hearing impaired students

English. For instruction in spoken English to be successful, intelligible speech is an absolute necessity. Successful communication must be two-way, and no one continues to speak without the hope of being understood.

As is evident to even a layperson from Ms. Daniel's videotaped evaluation, the speech therapy objectives in Bonnie's IEP were misdirected to objectives that had already been achieved and were again clearly irrelevant to further development of Bonnie's English language skills. The burden of improving Bonnie's speech intelligibility was in fact borne by Ms. Osterloh, Bonnie's private speech therapist, from whom Bonnie was receiving two one-hour sessions of individual therapy per week at the time of the February 1991 ARDs. During February 1991, the date of RDSD's speech goals, Ms. Osterloh and Bonnie were working on and achieving speech goals far beyond what RDSD had targeted.

Furthermore, the ARD Report and IEP again show no specific allocation of time for speech therapy.

In a multistudent classroom environment, attention of both the student and the teacher is compromised by the other students. Thus, while reinforcement of speech therapy and auditory training in the classroom environment is essential, it is no substitute for speech therapy and auditory training on a one-to-one basis in an isolated environment. CISD's concession of this fact was RDSD's provision of individual speech therapy. However, the amount of individual speech therapy Bonnie was in fact receiving at RDSD -- less than 45 minutes per week -- was little more than a token concession of the need. It was far less than what was necessary to make a significant improvement in Bonnie's speech intelligibility.

F.3 <u>All RDSD students are dependent on sign language</u>. For all RDSD students at elementary grade levels, sign language was and is the primary and preferred means for communication with teachers, teachers' aids, and other students. Except for Bonnie and one other student, sign language was and is the ***only*** means for such communication, because none of the other RDSD students had or have useful speech. When they did use their voices, their utterances were unintelligible, even to those familiar with deaf speech.

The situation for RDSD students in middle and high school

grade levels is not substantially different. ***All*** such students rely on sign language as their primary, preferred, and -- with rare exception -- ***only*** means means of communication amongst themselves and with others. With rare exception, none of the RDSD students has useful speech. The sign language used by RDSD students evolves to American Sign Language (ASL), which is so radically different from English in word order, grammar, syntax, and lexicon that it is impossible to speak English and sign ASL simultaneously and synchronously. Consequently, in the upper grades of RDSD, the pretense of attempting speech is discontinued. Signed "English" is in fact an artificial language which finds no application outside elementary levels of TC programs.

G. <u>Consequences of Manual Language</u>

G.1 <u>Lack of self-sufficiency</u>. Sign language becomes the first, preferred, and, in nearly all cases, ***only*** means of communication for children educated in TC programs, for whom literacy and overall education level are limited to an elementary school level. As a consequence, those educated in TC programs become dependent on sign language/speech interpreters and other social services of high cost and limited availability, accuracy, and completeness. Job opportunities are also limited primarily to low-paying, non-professional, manually-based jobs requiring minimal communication skills. Interaction with mainstream hearing society is difficult and unpleasant.

G.2 <u>Separation into a Deaf subculture</u>. Separated from mainstream hearing society by language, virtually all children educated in TC programs become assimilated in to the Deaf Community. As other members of the Deaf Community, they adopt ASL as their primary and preferred language and their social interactions are limited primarily to within the Deaf Community. All of the foregoing was taught to Bonnie's parents in courses offered by CISD through RDSD.

The Deaf Community defiantly proclaims itself to be a separate culture worthy of segregation away from hearing society, to which it somehow considers itself to be superior. The Deaf Community identifies itself as "the Deaf" with a capital "D". It advocates ASL to the exclusion of English as the primary and preferred language of "the Deaf," and insists

that all interaction with hearing society be carried out in ASL and not English. The Deaf Community believes that the real problem is mainstream society's *hearing*, not their deafness. They believe that the hearing world "owes" the Deaf Community government programs, support services, job opportunities, and other special consideration beyond what is reasonably justified. (An example might be *Hendrick Hudson Board of Education vs. Rowley* (458 US 176 (1982)). Publications in the record provide other examples.)

G.3 RDSD students. On campuses sponsoring TC programs, all students -- both hearing students and hearing impaired students -- are implicitly taught that segregation of all hearing impaired students into a Deaf subculture is not only acceptable, but is in fact appropriate. RDSD students at Calk Elementary, including Bonnie, were educated in temporary buildings separated off to one side of the permanent buildings in which non-handicapped students were educated. In the Calk Elementary cafeteria during lunch, RDSD students sat at tables separate from non-handicapped students. There was substantially no communication or social interaction between RDSD students and non-handicapped students in the Calk cafeteria. At Calk, RDSD students were segregated from non-handicapped students even during playground activities.

The Parent, Teacher, and Friends Organization (PTFO) of RDSD teachers and parents has served as a bridge to convey RDSD students into the Deaf Community. PTFO has been dominated by parents who promote sign language skills over -- and even at the expense of -- spoken English skills. An example was the proposed diversion of resources away from speech therapy to English/sign language interpreters.

H. Methods and Results of Education Without Manual Signs. Education of hearing impaired students without manual signs is accomplished by auditory training, speech therapy, and, in some cases, lip reading, all integrated with language development. Communication with and among students so educated, many of whom are profoundly deaf, is accomplished successfully by strictly oral means and without manual signs. Studies in the record show that such students achieve proficiency in spoken and written English, become productive self-sufficient members of mainstream society, and are free

from life-long dependence on the Deaf Community and the social services it is provided. As a specific example, proficiency in spoken English enables a hearing impaired child to participate in mainstream education with normal student-to-teacher ratios and without the encumbrance of or dependency on an expensive sign language/English interpreter of unacceptable availability, accuracy, or completeness. These statements about education of hearing impaired students without manual signs also all apply specifically to the program at Sunshine Cottage in which Bonnie was placed during April and May of 1991.

I. **Education offered and provided by CISD: the "transitional placement."** What CISD offered and provided as a result of the February, 1991 ARD meetings consisted of **nothing** other than continued placement at RDSD's Calk Elementary campus in Ms. Jasper's class with four other students, all of whom used sign language as their only means of communication, because none had any capability to communicate orally. The only significant change was that Bonnie's teachers were not to use manual signs in communication with Bonnie individually. However, manual signs would continue to be used in group instruction. CISD refers to this modification as the "transitional placement." The "transitional placement" in actual practice was not substantively different than what Bonnie had been provided prior to the February, 1991 ARDs. It did not correct any of the deficiencies discussed in Sections E.-G. supra. During March, 1991, Bonnie did in fact continue to use sign language both expressively and receptively as her predominate means of communication with her teachers and fellow students at RDSD. Bonnie's use of sign language during March, 1991 continued even in her individual communication with Ms. Jasper. However, it did not continue at Sunshine Cottage, where her parents placed her the following month.

CISD administrators Nora Hancock and Monet Dolinger -- **not** Bonnie's teachers -- were the source of "concerns" expressed during the February, 1991 ARD meetings regarding Bonnie's "transition" out of a sign language environment, of CISD's "transitional" placement concept, and of the opinions identifying the three remaining months of the school year as an

appropriate "transition" period. However, neither CISD nor the lower courts have been able to identify **any** IEP goal for which a "transition" or "weaning" period was needed or even desirable.

J. **CISD would not have provided FAPE without sign language without the present litigation**. Ms. Hancock and Ms. Dolinger are CISD administrators, and their "transitional placement" concept was apparently nothing more than a contrived administrative expedient to postpone providing Bonnie appropriate education without sign language for at least three months -- and possibly forever. In the absence of the present litigation, there is no reason to believe CISD would have offered Bonnie FAPE in a non-sign language environment. The ***first*** such offer was made ***no sooner*** than the August 8, 1991 ARD -- ***after*** Bonnie's parents had undergone the considerable expense of private education and the due process hearing -- and then only as a late defense in the present litigation. Prior to August 8, 1991, CISD's express and enforceable intentions were to include manual signs in Bonnie's education as documented in the February 28, 1991 ARD report under "Determination of Placement." For the previous 20 years, CISD and RDSD apparently had required all of their hearing impaired students to learn and be "educated" with sign language -- only for them to become speechless illiterates. Why is anyone to believe they do not intend to continue doing so? If not, why do they continue to defend vehemently the learning of sign language as appropriate for ***all*** hearing impaired students? Why are they unable to identify conditions under which learning sign language is not appropriate? Why, in view of Bonnie's obvious success, have they vehemently continued to oppose cochlear implant technology and to challenge its ability to provide previously deaf children enough hearing to readily acquire spoken English as their first and preferred language?

At any time after February 28, 1991, CISD was free to call an ARD meeting to make an enforceable offer of FAPE without sign language, but chose not to until August 8, 1991. If CISD had done so during April or May of 1991 and had reimbursed the expenses of Bonnie's parents, litigation would have been avoided. CISD instead chose to litigate. It therefore may not

argue having offered anything other than what is indicated in the February 28, 1991 ARD report under "Determination of Placement". CISD's provision to Bonnie of FAPE in the LRE in August, 1991 in no way absolves CISD of its failure to do so during March, April, and May of 1991.

Argument

K. FAPE in the LRE must be provided immediately. In effect, the Fifth Circuit ruled that CISD's "nine week transition period" -- actually the 12 weeks from February 28, 1991 to end of May, 1991 -- was an acceptably short period of time to continue its inappropriate use of sign language in Bonnie's education. In so ruling, the Fifth Circuit rejects the clear letter and intent of 34 CFR 300.342(b)(2), which states at the comment, "a handicapped child's Individualized Education Plan will be implemented ***immediately*** following the meetings under section 300.343. An exception would be (1) When meeting occurring during during summer or vacation period, or (2) where there are circumstances which require a short delay (e.g. working out transportation arrangements). However, there can be ***no undue delay*** in providing special education and related services to the child." Policy interpretation #4 states, "In general, ***no delay*** is permissible." [emphases added] CISD neither offered nor provided FAPE prior to August, 1991, because it did not have available the continuum of alternative placements required under 34 CFR 300.551 (P. infra). With resources far more limited than CISD's, Bonnie's parents were able to identify and implement appropriate education for Bonnie within ***one*** month of the February 28, 1991 ARD meeting. Even with its obligation to provide a continuum of alternative placements and the considerable resources it had available to identify and implement FAPE in the LRE for Bonnie, CISD was unable or unwilling to so during any of the ***three*** months after the February 28, 1991 ARD meeting. That delay was simply undue under 34 CFR 300.342(b)(2), which does not permit "transition periods."

If three months is not an "undue delay," just what would be? The lower courts have now eliminated any basis for any delay -- even years -- to be held "undue" under federal law.

L. IDEA is a nullity in the Fifth Circuit. However, the Fifth Circuit has now provided school districts a blueprint for

escaping accountability under IDEA. First, make vague, unenforceable suggestions that the problem will be corrected during the next school year. When the next school year arrives, continue to placate parents with such suggestions. But wait until parents have actually started litigation before taking any corrective action. Then, during the protracted litigation, use the defense that corrective action has been taken and that the delay was not undue. Finally, when the courts refuse to reimburse parents for their considerable expenses of litigation and private education, a clear punitive message will be delivered to any other parent who would dare challenge the school district: if you aren't satisfied with what we have offered, your cheapest way of correcting the problem is to educate your problem child yourself and stop bothering us. But this does not leave much hope for those children whose parents cannot afford private education.

With this blueprint to short-circuit due process, IDEA has been rendered a nullity in the Fifth Circuit. Although the Fifth Circuit has ruled in favor of educational agencies in numerous IDEA cases, Appellant is unaware of any IDEA case wherein the Fifth Circuit has ruled against an educational agency.

M. Education Offered Not Appropriate. In *Hendrick Hudson Board of Education vs. Rowley* (458 US 176 (1982)), the Supreme Court held that to satisfy 20 USC § 1412(1) and 20 USC § 1412(2)(B), FAPE must be "tailored to the unique needs of the handicapped child," "must meet the State's educational standards, must approximate grade levels used in the State's regular education, and ... should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." In the *Board of Education v. Diamond* (808 F.2d 987 (3rd Cir. 1986) at 991), the Third Circuit stated that special education must meet a "higher standard" than being merely "of benefit" and must be "likely to produce progress, not regression or trivial educational advancement." In *Armstrong v. Kline* (476 F.Supp. 583 (1979) at 604), the District Court of Pennsylvania concluded that "the unique needs that must be met by the educational program include those that, if satisfied, allow the child, within the limits of his or her handicap, to become self-sufficient." (Remanded on other grounds 629 F.2d 269, certiorari denied

101 S. Ct. 3123, 452 U.S. 968, 69 L.Ed.2d 981, on remand 513 F.Supp. 425.) In *Rowley* (at 201, footnote 23), the Supreme Court states, "The congressional intention [of IDEA], frequently expressed in the legislative history, [is] that handicapped children be enabled to achieve a reasonable degree of self-sufficiency."

Neither RDSD's auditory training (F.1), speech therapy (F.2), nor use of manual signs (E.-F. supra) were "tailored to the unique needs" of Bonnie, were "reasonably calculated to enable" Bonnie to achieve the proficiency in English language skills necessary "to achieve passing marks and advance from grade to grade", nor were "likely to produce progress" beyond "trivial educational advancement" in acquisition of the English language skills Bonnie needs "to become self-sufficient" "within the limits of ... her handicap" (C, D).

What is the theoretical, empirical, precedential, or authoritative basis for CISD's "transitional" methodology in which sign language is not needed or used in one-on-one communication but is needed and used in group instruction? What professional recognition is there for such methodology? What are the criteria for selecting such "transitional" methodology for a particular child? How did Bonnie meet such criteria?

What are the criteria for moving a particular child from such "transitional" methodology to an environment free of sign language? How did Bonnie meet such criteria on 8/8/91 but not on 2/28/91?

If CISD's and RDSD's sign language program for Bonnie were appropriate as alleged, how was it calculated to make Bonnie anything other than the speechless, functional illiterate it had made of all their other students (F.3-G.)? If any of CISD's and RDSD's hearing-impaired students have developed written language ability beyond the third-to-fourth grade level achieved by other TC sign language programs, who and where are they? If any of CISD's and RDSD's hearing-impaired students have escaped dependence on sign language as their primary and preferred language, who and where are they? Certainly none are apparent on Appellant's video tape of the RDSD track meet. In contrast, Ms. Daniel's students at the TALK Center, many of whom are profoundly deaf, communicate successfully by strictly oral means and

without sign language. CISD and the lower courts provide no answers to the above questions.

Since April 1, 1991, Bonnie has been successfully educated without sign language. She is presently successfully mainstreamed on grade level in regular education. This success is "the proof of the pudding" that Bonnie had no need for sign language or any other transitional element during the contested period and that use of sign language in Bonnie's education is presently clearly inappropriate. How, then, could it have been appropriate during the contested period? CISD and the lower courts again offer no objective standards, objective data, results from tests or studies, physical evidence, or any theoretical basis to suggest that use of sign language in Bonnie's education was appropriate during the contested period.

N. Requirement for Least Restrictive Environment Not Met. Education without manual sign language and with other students who communicate in the mainstream language of spoken English was clearly within the realm of "the maximum extent appropriate" for Bonnie. Even CISD's own evaluation by Ms. Hoaglund conceded that Bonnie had no need for sign language. However, unlike the vast majority of children in America and in CISD, Bonnie was subjected to the distraction and encumbrance of sign language in all group instruction as well as some individual instruction, was forced to continue to learn sign language to the detriment of more important educational goals, was segregated into temporary classrooms containing classmates who without exception were incapable of communicating in the mainstream language of spoken English, was segregated into temporary classrooms separated off to one side of the permanent buildings in which all other students capable of communicating in the mainstream language of spoken English were educated, and was similarly segregated during cafeteria and playground activities.

Such education of Bonnie by CISD and RDSD constituted "removal ... from the regular educational environment" and a violation of 20 USC § 1412(5)(B) and 34 CFR § 300.550(b). These provisions are commonly referred to as the requirement for education in the "least restrictive environment" (LRE).

Education with classmates who have a dependence on

sign language as their only means of communication is not only an *immediate* "removal from the regular educational environment," but also violates 20 USC § 1412(5)(B) for the second reason that it is not a "***procedure to assure*** that to the maximum extent appropriate, handicapped children ... are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." Education with classmates who have a dependence on sign language as their only means of communication was a procedure reasonably expected to cause Bonnie to also have an inescapable dependence on sign language. Such dependence on sign language reduces the likelihood that a child could be mainstreamed in regular classes, forces communication with mainstream society to be channeled through sign language-English interpreters, precludes meaningful positive interaction with non-handicapped students, reinforces segregation away from mainstream society, and could be avoided by education in a non-sign language environment (F.3-H). For Bonnie, use of sign language in education simply was not a "procedure to assure ... to the maximum extent appropriate" her maturation to a productive, self-sufficient participant in mainstream education and society.

Given that sign language is not used in the regular educational environment (including private preschools), what criteria must be satisfied before a student can be placed in a restrictive sign language environment? What is the evidence that Bonnie met such criteria? In *Daniel R. R. v. State Bd. of Education*, (874 F.2d 1049 (5th Cir., 1989)), the Fifth Circuit stated, "a child may be able to absorb only a minimal amount of the regular education program, but may benefit enormously from the language models that his non-handicapped peers provide for him."

O. <u>Equal Protection Under the Law Not Provided</u>. By educating Bonnie as described in the first paragraph of the previous section, CISD, acting as the agent for the State of Texas, denied Bonnie the equal protection under the law

explicitly mandated by the 14th Amendment to the U.S. Constitution. Having been maintained since before the Due Process Hearing, this argument is neither new nor changed. As the vast majority of children in America, Bonnie and her family have mainstream spoken English without manual signs as their native language. As the vast majority of children in America, Bonnie had no need for sign language and had mainstream spoken English without manual signs as her preferred language since no later than February, 1991 and as her substantially exclusive means of communication since no later than April 1, 1991. As the vast majority of children in America and only as a result of her parents' action to remove her from the Regional Day School for the Deaf's (RDSD's) sign language environment, Bonnie will achieve proficiency in spoken and written English; become a productive, self-sufficient member of mainstream society; and will be free from life-long dependence on the Deaf Community and the social services it is provided. In these regards, Bonnie ***was and is clearly "similarly circumstanced"*** to the vast majority of children in America and in CISD. CISD ***was and is required*** to treat her accordingly, but failed to do so. *Brown vs. Board of Education of Topeka,* 347 US 483 (U.S. Supreme Court, 1954) is relevant. An even more closely analogous case is *Gonzales v. Sheely*, 96 F.Supp. 1004 (U.S. Dist. Ct. D. Arizona, 1951).

Finding it to be "burdensome," the hearing officer ruled to discontinue use of manual signs with speech during testimony, but not during Bonnie's education. Although no parent would be satisfied if their non-handicapped child were educated as Bonnie was, the situation for Bonnie was more serious than it would have been for a non-handicapped child. Continued "education" of Bonnie as described would have resulted in an inescapable dependence on sign language and would have denied Bonnie the opportunity of becoming a self-sufficient participant in mainstream America.

P. <u>Continuum of Alternative Placements Not Provided</u>. 34 § CFR 300.551 states, "Each public agency shall insure that a continuum of alternative placements is available to meet the needs of handicapped children for special education and related services." In *Roncker vs. Walter* (700 F.2d at 1063

(1983); certiorari denied, 464 U.S. 864), the Sixth Circuit stated, "Cost is no defense, however, if the school district has failed to use its funds to provide a proper continuum of alternative placements for handicapped children. The provision of such alternative placements benefits all handicapped children."

Many hearing impaired and even deaf students have sufficient residual hearing or other ability to achieve proficiency in speaking, reading, and writing English (F.3, H. supra). Bonnie is such a student (C., D.). Such students should be provided education that does not force them to learn sign language, but instead targets, as its top priority, proficiency in spoken and written English as the first, preferred, and mainstream language (H). However, some deaf students might not be able to achieve proficiency in speaking, reading, or writing English. The education of these students must, by default, target as its top priority proficiency in sign language as the first and preferred language.

How can any single program -- TC or other -- even approximate FAPE for both of these extremely different groups of hearing impaired students? CISD and the lower courts provide no answer, because there is none. Although both groups share communication as the primary handicap resulting from their hearing impairment, the two groups must use fundamentally different languages and sensory functions to overcome their communication handicap. If the need to use fundamentally different languages and sensory functions in addressing communication handicaps is not a valid basis for different alternative placements, then under just what circumstances could different alternative placements be justified under 34 CFR § 300.551 and how? Just how does the lower courts' ruling not annihilate 34 CFR § 300.551 by reducing it to a totally meaningless absurdity? CISD and the lower courts offer no answers, because there are none.

In response to the fact that the two groups of hearing impaired students must use fundamentally different languages and sensory functions in addressing their communication handicaps, the Houston Independent School District offers a different placement for each group. Sign language is used in one, but not the other. However, refusing to be inconven-

ienced by this common sense or the obligation to meet the widely varying educational needs of hearing impaired students, many other educational agencies such as CISD dump all their "deaf" students into a single "one-size-fits-all" program to which they apply the brazenly deceitful misnomer "Total Communication." However, in so doing, TC programs, including RDSD, force ***all*** their students to learn and become dependent upon sign language, whether or not they need it. The videotape offered by appellant is filled with examples of RDSD students who are plainly dependent upon sign language as their first and preferred language. If CISD or RDSD has even one hearing impaired student who has not been required to learn and be educated with sign language or who has escaped dependence upon sign language, that student is yet to be identified.

Bonnie's educational priority was proficiency in spoken ***English***. Learning sign language or manual signs was ***not*** among Bonnie's educational needs. Because TC programs such as RDSD fail to meet the individual needs of hearing impaired students such as Bonnie, CISD was under the obligation to provide an alternative placement which did meet those needs. It had none to offer. CISD offers its "deaf" students either instruction in sign language at RDSD or no special education at all. If CISD's alleged "full continuum of alternative placements" included an appropriate placement for Bonnie, why is CISD unable to produce an ARD report with such FAPE indicated under "Determination of Placement"?

As a consequence of CISD's clear violation of 34 CFR § 300.551, Bonnie and other RDSD students whose parents have recognized them to be capable of proficiency in spoken English have been forced to seek appropriate education in other counties, sometimes requiring the parents to move and change jobs. It was the express intent of congress for IDEA to eliminate this very problem, as evidenced by [then EHA] finding (6): "because of the lack of adequate services within the public school system, families are often forced to find services outside the public school system, often at great distance from their residence and at their own expense."

More tragic has been the fate of other RDSD students whose very real ability to become proficient in spoken English

was not recognized by their parents and was, as a result, destroyed by RDSD.

Q. State Standard Not Met.

Q.1 Education without sign language preferred. With the language, "Recognizing the need for development of oral communications abilities in deaf children and the ability of many to achieve high educational excellence through *that method*," [emphasis added] TEC § 11.10(o)(6) specifically prioritizes the need for development of ***oral*** communication abilities over manual communication abilities and specifically recognizes the ability of many hearing impaired students to achieve high educational excellence through ***oral methodology***, but not any methodology that uses manual signs such as "Total Communication." TEC § 11.10(o)(6) therefore calls for development of spoken English proficiency and education without sign language as the first and preferred option for Texas' hearing impaired children.

With the immediately following phrase, "recognizing the inability of some to gain their education successfully by this means," TEC § 11.10(o)(6) concedes education with manual signs or sign language as a necessary but less desirable alternative to be used only with those hearing impaired students who are unable to be educated without it. However, with the call for "each child to be examined thoroughly so as to ascertain his potential for communications through oral means" and the "call for the use of methods of communication which will best meet the needs of each individual deaf child in this state," TEC § 11.10(o)(6) again seeks to assure that hearing impaired students who can be educated orally without sign language will be so educated, and that alternative methods of communication will be used only for those who cannot be educated orally. Neither CISD nor the lower courts provide credible alternative interpretations, because there are none.

Under TEC § 11.10(o)(6), use of manual signs is the ***last*** option, not the ***first and only*** option as it was for CISD before August, 1991. That the oral/aural method is preferable to methods such as "Total Communication" which rely on manual sign language is clearly and explicitly within the scope of TEC § 11.10(o)(6), which has been reduced to a nullity by the lower courts' refusal to concede this fact.

Q.2 Need for different placements based on ability to communicate orally. With the call to "establish separate programs to accommodate diverse communication methodologies," TEC § 11.10(o)(6) again seeks to assure that hearing impaired students who can be educated orally without sign language will be so educated, and further recognizes that the needs of such students are so fundamentally different from those requiring education with sign language as to constitute not only a valid but in fact the single most important grounds for different alternative placements under 34 CFR § 300.551. Neither CISD nor the lower courts provide a credible alternative interpretation, because there is none. As discussed earlier, the Houston Independent School District has "establish[ed] separate programs to accommodate diverse communication methodologies" for the "deaf." Sign language is used in one, but not the other.

If aural/oral education of a hearing impaired student can be achieved in the sign language environment of a TC program, then why does TEC § 11.10(o)(6) "recogniz[e] the need for development of oral communication abilities in deaf children and the ability of many to achieve high educational excellence through that method" and call to "establish separate programs to accommodate diverse communication methodologies," for "each child to be examined thoroughly so as to ascertain his potential for communications through oral means," and "for the use of methods of communication which will best meet the needs of each individual deaf child"? The lower courts and CISD offer no explanation, because there is none. TEC § 11.10(o)(6) clearly recognizes aural/oral education and education with manual signs as being mutually exclusive, and that fact is conceded in District Court Finding 20.

Q.3 No evaluation of oral capability. CISD failed to have Bonnie "examined thoroughly so as to ascertain h[er] potential for communications through oral means" as required by TEC § 11.10(o)(6) until April 30, 1991, when, in an evaluation requested by CISD, Elise Hoaglund found that Bonnie had no need for sign language during the contested period. Prior to Bonnie's placement at Sunshine Cottage and the February, 1991 ARDs, CISD made no attempt for Bonnie to be "examined thoroughly so as to ascertain h[er] potential for

communications through oral means" as required by TEC § 11.10(o)(6). If it did, when and by whom was the examination done, and what were the results?

If CISD and RDSD met the standard under TEC § 11.10(o)(6) for "each ["deaf"] child to be examined thoroughly so as to ascertain his potential for communications through oral means," then why did CISD and RDSD find it necessary to force every one of their "deaf" students to learn sign language at RDSD? Why are CISD and RDSD unable to identify even one "deaf" student capable of being educated with spoken English and without sign language? The lower courts and CISD provide no explanation, because there is none. This state standard simply was not met.

Q.4 **Best method of communication not used**. The method of communication which best met Bonnie's needs during the contested period was spoken English without sign language. Bonnie had no need for sign language. In CISD's own words, "an auditory-oral model would be the methodology which would best meet Bonnie's current needs." However, CISD's written offer of education to Bonnie called for use of sign language in group instruction and in fact also used sign language in individual communication, albeit to a lesser extent than in group instruction. It therefore failed to meet the standard under TEC § 11.10(o)(6) for "use of methods of communication which will best meet the needs of each individual deaf child." CISD and the lower courts cannot explain how the use of sign language best met Bonnie's needs in group instruction but not in individual instruction as called for by CISD's "transitional" IEP.

If CISD and RDSD met the standard under TEC § 11.10(o)(6) for "the use of methods of communication which will best meet the needs of each individual deaf child," then why did CISD and RDSD find it necessary to force every one of their "deaf" students to learn sign language at RDSD? Why were CISD and RDSD unable to identify even one "deaf" student capable of being educated with spoken English and without sign language? The lower courts and CISD provide no explanation, because there is none. This state standard simply was not met.

Q.5 **Accountability to state standard**. TEC § 11.10(o)(6)

establishes all of the above as state standards. CISD's accountability for meeting these state standards, if not clear from TEC Section 11.10(o)(6) itself, **is clear** from *Rowley* , in which the Supreme Court requires local educational agencies to provide FAPE that "must meet the State's educational standards" to satisfy 20 USC § 1412(2)(B) under the definition of FAPE at 20 USC § 1401(18). In both *Diamond* (at 992) and *Geis v. Board of Education of Parsippany-Troy Hills, Morris County* (774 F.2d 575, 583 (Third Circuit, 1985)), the Third Circuit held that IDEA requires a state standard to be met -- **even if it exceeds** that explicitly stated in IDEA -- because IDEA **incorporates** the state standard. Therefore, whether or not CISD is directly accountable to TEC § 11.10(o)(6) under ***state law*** is totally irrelevant to and in no way can change the fact that ***federal law*** places CISD directly accountable to TEC § 11.10(o)(6).

The District Court's attempt (p. 55-56) to replace TEC 11.10(o)(6) with the "Regional Program Evaluation Guide" (RPEG) is clear error. It fails to explain how RPEG can possibly change, replace, or override the clear state standards established statutorily in TEC § 11.10(o)(6) and enforced statutorily by 20 USC §§ 1412 (2)(B) and 1401(18)(B). There is no evidence or logic to suggest that RPEG would assure compliance with TEC 11.10(o)(6). Furthermore, RPEG provides little support for the use of sign language.

R. Placement Not Individually Made. In *Roncker* (at 1064), the Sixth Circuit stated, "Although we agree with the district court's statement that the Act requires individual determinations as to placement, one of the plaintiff's claims is that the school district automatically sends students classified as Trainable Mentally Retarded to the county schools. Such an allegation, if proven, would show a violation of the Act for the very reason that placements were not individually made."

CISD similarly violated the IDEA requirement for individual determinations as to placement, because it automatically sent all its "deaf" students to the Regional Day School for the Deaf to learn sign language. If not, which students did CISD classify as "deaf" and ***not*** send to RDSD? Why were CISD and RDSD unable to identify even one "deaf" student capable of being educated with spoken English and without

sign language? CISD further violated the requirement of 34 CFR § 300.349 that "each public agency must provide special education and related services to a handicapped child in accordance with an *individualized* education program" by erroneously classifying Bonnie as "deaf" (C. supra; 34 CFR § 300.7 (3) and (4)).

S. FAPE in the LRE Could and Should Have Been Provided at Magee. The least restrictive environment for Bonnie's education has always been Magee Elementary School, the school 300 yards from Bonnie's home which she would have normally attended without a hearing impairment and which she presently attends. 34 CFR 300.552(a) states, ""Each handicapped child's educational placement ... is based on his or her individualized education program and is as close as possible to the child's home." 34 CFR 300.552(c) states, "unless a handicapped child's individualized education program requires some other arrangement, the child is educated in the school which he or she would attend if not handicapped."

During the contested period, Bonnie had no requirement or need for RDSD's sign language program at Calk elementary, 25 miles away from her home. Why could she not have been educated at the school she would have normally attended, Magee elementary, 300 yards from her home, as required by 34 CFR § 300.552(a) and (c)? There is only one reason: during the contested period, CISD was simply unwilling to provide Bonnie at Magee -- or, for that matter, anywhere else -- the "related services ... in accordance with an *individualized* education program" required by 34 § CFR 300.349. There was absolutely no provision for the "related services" necessary to address Bonnie's critical needs for auditory training and speech therapy integrated with language development. That is, until August, 1991, when CISD **was able and finally willing** to provide Bonnie such services at Magee.

T. The School's Choice of Methodology is Fully Subject to Tests of FAPE in the LRE. While educators may have primary responsibility for choosing the educational method most suitable to the child's needs, the educator's choice of methodology is nonetheless required to withstand the full scrutiny of a "FAPE in the LRE" inquiry under IDEA. "***Once it***

is shown that the Act's requirements have been met, questions of methodology are for resolution by the responsible authorities." (*Lachman vs. Illinois State Board of Education* , 852 F.2d 290, 7th Cir., 1988, quoting *Rowley*, 458 US at 208, 102 S. Ct. at 3042; emphasis added). Therefore, while educators are free to choose from the pool of available appropriate methodologies, inappropriate methodologies are simply excluded from that choice. There is no legitimate umbrella of methodology immunity to shield educational agencies from accountability under IDEA.

If a public school offers and uses a methodology A which is inappropriate for a specific child and the parents enroll that child in a program that uses an appropriate methodology B, federal courts are obligated to rule methodology A inappropriate for that specific child, methodology B appropriate for that specific child, and the public school to pay costs for placement in the program that uses methodology B. By so ruling, the courts neither impose their view of preferable educational methods nor choose between two competing schools of thought in educating the hearing-impaired as suggested by Visco *by Visco v. School District of Pittsburgh*, 684 F.Supp. 1310 (W.D.Pa. 1988) at 1313. Such a ruling in no way excludes the public school's use of methodology A with other specific children for whom it is appropriate, nor does it require the public school to use methodology B. If methodologies C and D are also appropriate for the specific child in question, the public school is also free under the court's ruling to choose among methodologies B, C, and D for that specific child. The court's ruling merely excludes methodology A for the specific child in question.

Where a specific methodology is inappropriate for a specific individual, the refusal of a federal court to so find is an abdication of that court's legal and ethical responsibilities that serves only to obstruct the express letter and intent of IDEA. Communication with Bonnie by a methodology of mental telepathy would clearly be inappropriate under IDEA, and should be so held by federal courts. If courts were unwilling or unable to do so, IDEA would be instantly and totally annihilated. ***Any and all*** deficiencies, however large or small, could be made immune to challenge merely by the school district declaring the

deficiency to be its methodology of choice. Use of sign language in Bonnie's education is clearly inappropriate under IDEA, and must be so held by federal courts.

By removing their child from an inappropriate methodology and placing their child in a program that uses an appropriate methodology, parents in no way compel a school district to provide a specific program or employ a specific methodology in providing for the education of their handicapped child. The school district not only remains free to identify and implement an ***appropriate*** methodology of its choice, but is in fact required to do so under IDEA. Furthermore, the school district is in no way relieved of that obligation by the parents' identification and implementation of an appropriate methodology. Although CISD was free to identify and offer an ***appropriate*** methodology other than that identified and implemented by Bonnie's parents, it made no effort to do so. Instead, CISD insisted that Bonnie and her parents simply submit to its inappropriate placement. The placements erroneously alleged to have been offered were admitted to be inappropriate, if they even existed.

Lachman is fully consistent with the above analysis. In *Lachman*, the Seventh Circuit granted deference to the agency's choice of TC over Cued Speech only because, for the child at issue, it found TC to meet the requirements of FAPE in the LRE: "It is clear that the IEP proposed by the school district is based upon an accepted, proven methodology for facilitating the early primary education of profoundly hearing-impaired children. Further, nothing in the record indicated that the proposed IEP does not provide that Benjamin will be educated in a regular classroom environment to the maximum extent appropriate as required by Section 612(5)(B) of the Act." (852 F.2d 290 at 297)

Lachman's factual findings with respect to TC would be clear error in the context of the present case. Other circumstances which distinguish *Lachman* from the present case are as follows.

In *Lachman*, the child at issue was profoundly deaf and allegedly unable to benefit from education without manual signs. At issue was the choice between two different restrictive, non-mainstream manual sign methods, Cued

Speech and the Signed "English" of TC. In the present case, Bonnie hears, speaks, and understands spoken English and is able to benefit from instruction in mainstream spoken English without restrictive, non-mainstream sign language.

In *Lachman*, the Court perceived the issue as a choice between two manual sign methods that were of comparable end result under IDEA. In the strictest sense, the choice in the present case is not between two methods, but between education with exclusive use of mainstream spoken English and a method using sign language. The alternatives of the present case have immensely different educational and social results. Bonnie's request for FAPE with mainstream spoken English and without restrictive, non-mainstream sign language is therefore not a request "to provide a specific program or employ a specific methodology" as in *Lachman*, but merely a request to invoke the state of Texas's requirement under TEC Section 11.10(o)(6) to teach Bonnie mainstream English ***in the absence of sign language methodology***.

The basis of the whole "methodology" issue surrounding IDEA is the Supreme Court's statement, "The Act expressly charges States with the responsibility of 'acquiring and disseminating to teachers and administrators of programs for handicapped children significant information derived from educational research, demonstration, and similar projects, and [of] adopting, ***where appropriate***, promising educational practices and materials.' §1413(a)(3). In the face of such a clear statutory directive, it seems highly unlikely that Congress intended courts to overturn a State's choice of appropriate education theories in a proceeding conducted pursuant to § 1415(e)(2)." (*Rowley*, 458 US 176 (1982) at 207-208, emphasis added) As seen in Section Q. supra, the Texas State legislature fulfilled its obligation under 20 USC §1413(a)(3) by establishing the methodology guidelines in Texas Education Code § 11.10(o)(6). Having failed to abide by these guidelines, CISD is barred from asserting a defense of "methodology immunity."

U. <u>Failure to Consider or Allow Production of Evidence</u>. 20 USC § 1415(e)(2) explicitly requires that a district court reviewing a special education hearing officer's decision "***shall*** hear additional evidence at the request of a party" (emphasis

added). Consistent with this explicit requirement are *Rowley* (458 US 176 (1982) at 205) and the Fifth Circuit's adoption of "the view that the district court's review of the hearing officer's decision is virtually de novo" in *Teague Independent School District v. Todd L.*, 999 F.2d 127 (5th Cir. 1993) at 131. In clear violation of 20 USC § 1415(e)(2) is the District Court's refusal to admit and consider affidavit and declaration evidence offered at about p. 276-654 of the record. Also in clear violation of 20 USC § 1415(e)(2) are the District Court's refusal to hear and consider requested testimony of Hoaglund, Embley, and Bruce; refusal to grant the requested written discovery or to require CISD to respond to Plaintiff's Interrogatories, Request for Production and Requests for Admissions; and requirement for explanations of why evidence was not offered to the hearing officer.

The only reason offered by the District Court for not hearing and considering all the evidence presented is its statement at note 1 of its decision, "The court has not, however, considered certain evidence supplemental to the administrative record which the plaintiff submitted, including but not limited to certain affidavits and scholarly materials, given the status of this proceeding as essentially a review of an administrative decision." However, "the status of this proceeding as essentially a review of an administrative decision" is a capricious and insufficient basis for the District Court to separate some of the newly offered evidence as inadmissible and to distinguish such evidence from the other newly offered evidence, which was held to be admissible and appropriate for consideration. It also explicitly violates 20 USC § 1415(e)(2).

V. <u>Sanctions</u>. The District Court should have sanctioned counsel for Plaintiffs only in its order of sanctions. There was no showing on the part of Defendant that Plaintiffs, individually, had contributed to the delay which allegedly necessitated an application for sanctions. Absent a showing of culpability on the part of a party, sanctions should only be ordered against counsel for the party. *Seismic Int'l Research Corp. v. South Ranch Oil Co.*, 793 F.2d 227 (10th Cir. 1986), cert. denied 479 U.S. 1089, 107 S. Ct. 1297, 94 L.Ed. 2d 153. Furthermore, the amount of sanctions were clearly excessive and the imposition of such a high amount of fees, given that

the pretrial order had previously been prepared for a trial date which was continued, was an abuse of discretion. *John v. State of Louisiana*, 899 F.2d 1441 (5th Cir. 1989). Finally, it was an abuse of discretion to apply ***any*** sanctions to Appellant's attorney's response to a Litigation Management Order which violated 20 USC § 1415(e)(2) (U. supra).

A party's lack of response to a motion in no way absolves a court of its responsibility to make a correct ruling on that motion on the basis of the available evidence, nor should it enable an a incorrect ruling to escape due process review. Insofar as the ruling on sanctions came as part of a final judgment, correct due process review of that ruling was the appeal to the Fifth Circuit. Irrelevant to that fact are the Fifth Circuit's statements that "Bonnie's parents did not contest the entry of sanctions in the district court" and "issues not raised before the trial court cannot be raised for the first time on appeal."

W. <u>Clear Error of the District Court's Findings and Conclusions</u>. CISD has the legal responsibility to prepare an IEP and ARD report (34 CFR § 300.341(a); 34 CFR § 300.343(a)) containing an offer of FAPE meeting the requirements of the 14th Amendment to the U.S. Constitution, 20 USC § 1412(1), 20 USC § 1412(2)(B), 20 USC § 1412(5)(B), 34 CFR § 300.342(b)(2), 34 CFR § 300.349, 34 CFR § 300.550, 34 CFR § 300.551, 34 CFR § 300.552(a) and (c), and TEC § 11.10(o)(6). These obligations were totally CISD's. Clear error is the District Court's *ad nauseam* reliance on erroneous allegations that Bonnie's father was somehow responsible for CISD not meeting these obligations. Furthermore, **<u>all</u>** of the issues and complaints discussed in this Petition with regard to CISD's failures to meet these obligations were properly maintained during the administrative due process hearing and the proceedings in the lower courts, as was Appellant's claim for reimbursement of tuition costs, speech therapy fees, attorney's fees, and transportation costs.

The District Court's Findings and Conclusions are clear error to the extent that they contradict, impugn, or obfuscate the discussion and conclusions of this Petition. Much of the discussion in the District Court's decision was irrelevant to the

issues. Many of the District Court's errors, including its reliance on the impeached testimony of CISD witnesses Hancock and Bernstein, require a more detailed discussion of the record than would be appropriate in this Petition.

Appellants pray that this petition for review of the lower courts' decisions be granted.

_____ Date: _____

John R. Fritch, next friend of
Bonnie Ann Fritch

APPENDIX A

U.S. COURT OF APPEALS
FILED
NOV 11 1994
CHARLES R. FULBRUGE III
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-7641
Summary Calendar

BONNIE ANN F. b/n/f
JOHN R. and KAREN A. F.,

Plaintiff-Appellant,

versus

CALALLEN INDEPENDENT SCHOOL
DISTRICT,

Defendant-Appellee.

Appeal form the United States District Court for the
Southern District of Texas
(C 91 259)

Before Judges KING, JOLLY, and DeMOSS, Circuit Judges.

PER CURIAM:*

This appeal requires us to consider primarily whether the

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published. s\ HRD CDK EGJ

parents of Bonnie Ann F., a hearing disabled child resident in the Calallen Independent School District, are entitled to be reimbursed for educational costs when they unilaterally placed their daughter in an alternate educational program for nine weeks. The district court made extensive findings of fact, so we need not repeat them here. Bonnie Ann F. v. Calallen Indep. Sch. Dist., 835 F.Supp. 340 (S.D. Tex 1993). We affirm.

I

Reduced to its essence, Bonnie's parents argue that the school district violated the Individuals with Disabilities Education Act (the "IDEA"), 20 U.S.C. § 1400 et. seq., Texas law, and the federal Constitution, by failing to remove Bonnie immediately from an environment in which signed language is used.

In this respect, Bonnie's parents argue, the plan fails to satisfy the requirements of the IDEA and the underlying Texas law in that it did not provide the least restrictive environment; it did not offer a continuum of alternative placements; and it did not meet the state standard. We find no merit in these arguments.

Bonnie's parents do not dispute that, except for the three-month transition period at issue in this appeal, her educational plan satisfied the requirements of IDEA and the underlying Texas law. Instead, their argument springs from the allegation that, once having determined that Bonnie should enter an aural/oral program to end her use of signed language, the school district had the responsibility to see that Bonnie immediately cease all exposure in school to signed language. However, neither the IDEA nor the applicable Texas law imposes such a requirement. Accordingly, we hold that the plan is consistent with the IDEA.

In the light of our conclusion that the plan satisfies the IDEA, Bonnie's parents must point to clear error in the district court's conclusion that the school district's plan was appropriate and that she benefitted (or would have benefitted) from her program. We bear in mind that we are considering here a nine-week transitional period. Having reviewed the record and considered the arguments, we find no error. We therefore agree with the district court that Bonnie's

parents are not entitled to reimbursement under the IDEA.

We agree as well that Bonnie's parents failed to state a claim under the Equal Protection Clause of the Fourteenth Amendment. With no citation to supporting authority, they argue that the school district violated Bonnie's constitutional rights when it failed to remove her from a program in which sign language was used. We find no merit in the argument. Accordingly, we affirm the district court's judgment with respect to Bonnie's constitutional claims.

II

Bonnie's parents also contest the district court's award of sanctions against them. The school district moved for sanctions against Bonnie's parents or their attorney for failing to provide the school district with copies of documents they filed with the court, for unilaterally altering the jointly-submitted pretrial order without notice or approval of the school district, and for submitting additional evidence in violation of court order. Neither they nor their attorney responded to the motion. In accordance with its local rule, the court took that lack of response as indicating no opposition and entered the sanctions against "plaintiff, or plaintiff's counsel."[1]

It is axiomatic that issues not raised before the trial court cannot be raised for the first time on appeal. Bonnie's parents did not contest the entry of sanctions in the district court, and they do not complain of a lack of notice. Accordingly, we deem their opposition waived. See, e.g., Abbot v. Equity Group, 2 F.3d 613, 627 n.50 (5th Cir. 1993), cert. denied sub nom. Turnbull v. Home Ins. Co., _____ U.S. _____, 114 S.Ct. 1219 (1994).

III

We AFFIRM the judgment of the district court in all respects.[2] AFFIRMED.

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[1]The plaintiff's counsel is not a party to this appeal and has not appealed the order of sanctions.

[2]Pending before us are two motions by the school district to strike the brief and reply brief submitted by Bonnie's parents. On their pro se appeal, they continue to refer to the material they submitted after trial. In the light of our disposition of this

case, we dismiss those motions as moot. Our consideration of this case was limited to material that is properly part of the record on appeal.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED
SEP 20 1993
Michael N. Milby, Clerk
By Deputy s\M. Fegan

CLERK, U.S. DISTRICT COURT
RECEIVED
SEP 17 1993
SOUTHERN DIST OF TEXAS
CORPUS CHRISTI, TEXAS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

BONNIE ANN F., by her next friends
JOHN R. and KAREN A. F.,
Plaintiff,

v. Civil No. C-91-259

CALALLEN INDEPENDENT SCHOOL DISTRICT,
Defendant.
_____/

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In this action filed under the Individuals with Disabilities in Education Act ("IDEA," formerly the Education of the Handicapped Act), 20 U.S.C. § 1400 et seq., the plaintiff, a hearing impaired child, is alleging that the defendant school district failed in its obligation to provide her with a free appropriate public education as required by federal law. On her behalf, her next friends and parents are seeking reimbursement from the defendant for the costs of attendance at a private school for the deaf during a nine-week period in

1991.

At the conclusion of an administrative hearing, a hearing officer determined that the defendant had fulfilled its responsibility to provide the plaintiff with a free appropriate public education as required by the IDEA. The plaintiff then filed this action under 20 U.S.C. §§ 1415(e)(2) and (e)(4)(A). The matter is now ready for decision.

FINDINGS OF FACT

Based on the administrative record on file with this court, based on the testimony and exhibits received at trial, based on the pretrial order on file with the court, including the admissions of fact contained therein, the court makes the following findings of fact as required by Fed.R.Div.P. 52(a)[1]

1. Plaintiff Bonnie Ann F. (hereinafter "Bonnie") was born on May 21, 1987.

2. This action is filed on the plaintiff's behalf by her next friends, her parents John R. F. and Karen A. F.

3. At all times pertinent to this action, Bonnie resided with her parents within the boundaries of the defendant Calallen Independent School District ("CISD").

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[1]Any finding of fact containing conclusions of law shall be considered as such.

In making its findings, the court has considered the evidence admitted at the administrative hearing as well as the supplemental evidence admitted at the trial of this matter. The court has not, however, considered certain evidence supplemental to the administrative record which the plaintiff submitted, including but not limited to certain affidavits and scholarly materials, given the status of this proceeding as essentially a review of an administrative decision. The court has likewise not considered plaintiff's "Post-Hearing Brief and Discussion of Evidence," and the defendant's motion to strike this brief (docket no. 78), which the plaintiff has not opposed, is hereby GRANTED. Plaintiff's brief contains references to documents not offered or admitted into evidence, and rather than to parse out those portions which are based on the evidence and those which are not, the court has determined that the entire document should be stricken in its entirety.

4. Bonnie was born a hearing child. However, on May 3, 1989, near the age of two, she contracted meningitis and suffered a profound loss of hearing in both ears. On August 10, 1989, testing indicated that she had no detectible hearing.

5. After Bonnie lost her hearing, her parents immediately began a parent/infant program through the CISD.[2] This program used the "total communication" methodology by mutual consensus of the CISD and Bonnie's parents. As part of the program, and at the choice of her parents, both Bonnie and her parents began sign language instruction.

6. Total communication is an instructional methodology employing a multimodal, multichannel method of instruction for speech, listening, language, and academic development of hearing impaired children. The philosophy of the methodology focuses on the use of any and all channels or modes of communication in order to reach effective two-way communication with a child. Total communication allows and encourages the use of signed English, provided it is helpful in a given situation with a given child.

7. In mid-March, 1990, Bonnie received a cochlear implant. The implant was activated on April 28, 1990.

8. A cochlear implant is a relatively new technology available for use by hearing impaired children who have a specified degree of hearing loss. The implant does not restore normal hearing; sounds that are heard through the device do not precisely resemble those heard by persons with normal hearing capabilities.

9. Bonnie remains a hearing impaired child despite her cochlear implant.

10. Implant users, such as Bonnie, must go through a great deal of relearning following receipt of the device. After receiving her implant, Bonnie made significant progress in her

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[2]The parent-infant program was adopted by the Texas Education Agency to provide services to hearing impaired children ages birth to three years. Among other things, it provides parents with educational information and instruction concerning deafness and its implications for educational purposes, and educates infants in the components of communication.

speech development.

11. During the 1990-91 school year, Bonnie was placed at the Regional Day School for the Deaf, located at Calk Elementary School, located approximately 25 miles from her home district.[3]

12. At Calk Elementary, Bonnie was placed in teacher Sue Ann Jasper's class, a self-contained classroom in which, at the time, five handicapped students, ages three and four, were being instructed by Ms. Jasper and a paraprofessional. Ms. Jasper holds certificates in speech pathology, speech and hearing therapy, and deaf education. Bonnie's school day began at 8:00 a.m. and ended at 3:00 p.m.

13. The instructional methodology used in Ms. Jasper's class was total communication. At the beginning of the 1990-91 school year, Bonnie communicated using total communication.

14. The major elements of Bonnie's educational program were language development, speech development, auditory training, preschool readiness activities, and motor development.

15. Ms. Jasper provided Bonnie with individual auditory training and speech therapy for a short period of time during the school day. She then reinforced and integrated these lessons throughout the day. Language development training was incorporated in daily class activities.

16. Judy Brashear, a speech therapist employed by the Corpus Christi Independent School District in which Calk Elementary School was located, supplemented Ms. Jasper's speech, language, and auditory training by providing

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[3]Calk Elementary School is a regular elementary school located in the Corpus Christi Independent School District. The Corpus Christi Independent School District is the fiscal agent of the Regional Day School Cooperative which serves auditorially handicapped children. Defendant Calallen Independent School District is a member of the Regional Day School Cooperative. The Regional Day School for the Deaf is not a separate school itself; rather, classes are conducted on various campuses located in the Cooperative.

individual therapy 45 minutes per week.

17. At some point during the 1990-1991 school year, Bonnie's father, John R. F., became concerned because he believed that Bonnie had a preference for sign language over speech. Mr. F. decided that he did not want Bonnie to use sign language, because he feared that it would lead to her becoming part of what he described as the "deaf subculture" or "deaf community."

18. On December 28, 1991, Bonnie's parents obtained an evaluation of their daughter from the Houston Ear Research Foundation. Bonnie was three years, seven months old at the time of this evaluation. As a result of this evaluation, Bonnie's language age was assessed at three years, three months on a receptive vocabulary test, and three years on an expressive English syntax test.

19. On February 8, 1991, Bonnie's parents obtained another evaluation of their daughter, this time an informal assessment, from Linda Daniel, the director of the TALK Center, located in Dallas, Texas. The TALK Center provides therapy and training to hearing impaired children directed to the development of spoken English without the use of sign language. Ms. Daniel herself does not sign. She met with Bonnie for approximately one hour and performed no formal testing. As a result of her meeting with Bonnie, Ms. Daniel recommended that Bonnie be placed in an aural/oral classroom program, combined with individual therapy or tutoring.

20. Like total communication, an aural/oral methodology uses auditory training, speech development, and language development in communicating with hearing impaired children. However, unlike total communication, the aural/oral approach excludes the use of signed English. The latter philosophy instead focuses on communication and speech development without signing.

21. Mr. F. left the visit to the TALK Center determined to follow Ms. Daniel's recommendations regarding his daughter in full. He was, at that point, determined that his Bonnie would be removed from any exposure to an environment in which sign language was used.[4]

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[4]Bonnie's mother, Karen A. F., was not quite as firm in her

22. Mr. and Mrs. F. requested an Admission, Review and Dismissal ("ARD") Committee meeting with the CISD, which was held on February 12, 1991. At this ARD Committee meeting, Mr. F. requested that Bonnie be placed in an aural/oral program, without the use of sign language. He also requested, in addition to a change in Bonnie's placement, that the CISD provide Bonnie with one hour per day each of individual speech therapy and auditory training. The ARD Committee, while generally agreeing that Bonnie should be placed in an aural/oral environment, suggested alternatives, including placing Bonnie in a private nursery school at the district's expense and placing her in a pre-kindergarten program located in the district. However, Mr. F. expressed an inability to make a decision and requested a recess of the meeting.

23. The ARD Committee reconvened on February 28, 1991. At that meeting, Mr. F. stated that he did not have any disagreement with Bonnie's Individual Education Plan (IEP") itself. However, he persisted in his request that Bonnie be provided with a separate aural/oral program.

At the meeting, Bonnie's teachers expressed concerns regarding Bonnie's transition from a total communication to an aural/oral program, and suggested the remaining three months of the school year as an appropriate transition period. The ARD Committee agreed that Ms. Jasper and Ms. Brashear would not use the signed English component of total communication when working with Bonnie on an individual basis; in other words, they agreed that all one-on-one communication with Bonnie would be in spoken English only. The ARD Committee, however, desired that Bonnie remain in the total communication environment of Ms. Jasper's classroom for the period from March, 1991 to May 1991, as a transition period from her current environment to an aural/oral placement, which they agreed to provide beginning in August,

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resolve to insulate Bonnie from signing. She continued to use sign with Bonnie in their home on certain occasions, including times when Bonnie's implant was not in operation, when communicating with Bonnie at a distance, and when trying to emphasize certain words with her daughter.

1991.[5]

24. Despite the assurances given by the ARD Committee that CISD would provide an aural/oral program for Bonnie during the 1991-1992 school year, Mr. F. remained concerned -- unreasonably so, in the court's view -- that the district would not provide such a program. At the February 28, 1991 ARD Committee meeting, Mr. F. presented the Committee with a typed letter to the Commissioner of Education requesting a due process hearing.

25. After the February 28, 1991 ARD Committee meeting, Ms. Jasper and Ms. Brashear discontinued the use of signed English when working with Bonnie on an individual basis.

26. The 1991 IEPs for Bonnie show that she made progress on her auditory learning goals, language arts goals, readiness goals, social/emotional goals, social science goals, and math goals. All in all, during her enrollment in Ms. Jasper's class, Bonnie made significant progress toward becoming an "oral" child.

27. On April 1, 1991, Mr. and Mrs. F. unilaterally enrolled Bonnie in the Sunshine Cottage for the Deaf and rernoved her from Ms. Jasper's class at Calk Elementary.[6] Sunshine Cottage is located in San Antonio, Texas approximately 300 miles from Mr. and Mrs. F.,'s residence. During April and May, 1991, for approximately nine weeks, Bonnie was transported daily by her uncle to San Antonio in order to attend class for three hours and fifteen minutes at Sunshine Cottage.

28. Sunshine Cottage offered an aural/oral program for hearing impaired children without the use of sign language. The specifics of Bonnie's program at Sunshine Cottage have

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[5]The CISD's plan for the 1991-1992 school year was to place Bonnie in a newly-developed aural/oral program at Magee Elementary School, which is Bonnie's "home" school, being nearest to her parents' residence. (Magee is located approximately 300 yards from Mr. and Mrs. F.'s residence.) Bonnie was eventually enrolled in that program as planned, and the parties are in agreement that this was an appropriate program for her.

[6]Mr. and Mrs. F. did not discuss Bonnie's move to Sunshine Cottage with the ARD Committee.

not been established; no one from the school has testified in these proceedings, and Mr. F. did not observe Bonnie at the school. While Mrs. F. observed her daughter at the school on a brief videotape and for a second, more extended period in person, she did not relate the entire content of Bonnie's educational program at the school.

29. During April and May, 1991, Mr. and Mrs. F. also obtained private speech therapy and auditory training for Bonnie from Ms. Patsy Osterloh. These sessions, which Bonnie attended for a total of three hours per week, were intended by her parents to supplement the Sunshine Cottage program.

30. At the due process hearing held May 14 to May 16, 1991, the parties stipulated that the sole issue for the hearing was whether Bonnie's parents were entitled to reimbursement for their unilateral placement of Bonnie at Sunshine Cottage beginning on April 1, 1991, due to an alleged inappropriateness of the education being provided to Bonnie by CISD at that time.

31. After the conclusion of the due process hearing, the hearing officer determined that the reimbursement relief sought by Mr. and Mrs., F. on behalf of Bonnie for her unilateral placement at Sunshine Cottage was not supported, because Bonnie was receiving a free, appropriate public education from CISD until she was withdrawn by her parents.

32. During the 1992-1993 school year, Bonnie was fully mainstreamed in a regular kindergarten class. Her ability to be mainstreamed at such an early age has exceeded even Mr. F.'s expectations. While Mr. F. attributes Bonnie's success at least in part to her experience at Sunshine Cottage, Mrs. F. has expressed disappointment in the Sunshine Cottage program because she believed that much of what Bonnie had learned at the school had been a repeat of what she had already learned in Ms. Jasper's class.

33. When Bonnie was removed by Mr. and Mrs. F. from Ms. Jasper's class at the end of March, 1991, she was receiving a free, appropriate public education in an appropriate placement.

CONCLUSIONS OF LAW

In accordance with Fed.R.Civ.P. 52(a), the court reaches the following conclusion of law[7]:

A. The court has jurisdiction over this matter under the IDEA, pursuant to 20 U.S.C. § 1415(e)(2) and (e)(4)(A).

B. Venue is proper in this district.

C. Pursuant to 20 U.S.C. § 1412(1), Bonnie is and was, at all time pertinent to this action, entitled to a free appropriate public education from the CISD.

D. The IDEA defines a "free appropriate public education" as special education and related services that--

> **(A)** have been provided at public expense, under public supervision and direction, and without charge,
>
> **(B)** meet the standards of the State educational agency,
>
> **(C)** include an appropriate preschool, elementary, or secondary school education in the State involved, and
>
> **(D)** are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

20 U.S.C. § 1401(18).[8]

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[7]Any conclusion of law containing findings of fact shall be considered as such.

[8]"Special education" is defined by the IDEA as

> specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a child with a disability, including--
>
> **(A)** instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and
>
> **(B)** instruction in physical education.

20 U.S.C. § 1401(16).

Prior to the 1991 amendment of the IDEA, the term "related services" was defined as

> transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology . . .) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of

E. The individualized education program, or "IEP," is the "modus operandi" of the IDEA. School Committee of the Town of Burlington, Massachusetts v. Department of Educ. of the Commonwealth of Massachusetts, 471 U.S. 359, 105 S.Ct. 1996, 2002, 85 L.Ed.2d 385 (1985). The IEP is, in brief,

> a comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and related services to be employed to meet those needs. § 1401(19). The IEP is to be developed jointly by a school official qualified in special education, the child's teacher, the parents or guardian, and where appropriate, the child. In several places, the Act emphasized the participation of the parents in developing the child's educational program and assessing its effectiveness.

Id. However, because Congress has recognized that this cooperative approach envisioned by the Act "would not always produce a consensus between the school officials and the parents," the district courts' grant of authority under 20 U.S.C. 1415(e)(2) includes the power to order school authorities to reimburse parents for their expenditures on private special education for a child if the court ultimately determines that such placement, rather than a proposed IEP, is proper under the IDEA. Id., 105 S.Ct. at 2002.

F. Pursuant to 20 U.S.C. § 1414(a)(5), prior to its 1991 amendment, local educational agencies such as CISD were required to

> establish or revise, whichever is appropriate, an individualized education program for each handicapped child at the beginning of each school year and . . . then review and, if appropriate, revise, its provisions periodically, but not less than annually.

G. The requirement of a free appropriate public education is satisfied if the State provides personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Board of Educ. of the Hendrick Hudson Central School Dist. v. Rowley, 458 U.S.

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handicapping conditions in children.
20 U.S.C. § 1401(17).

176, 102 S.Ct. 3034, 3049, 73 L.Ed.2d 690 (1982); Christopher M. v. Corpus Christi Indep. School Dist., 933 F.2d 1285, 1289 (5th Cir. 1991). While the educational benefit provided to the child must be "meaningful," the IDEA does not require the State to attempt to maximize each child's potential Christopher M., 933 F.2d at 1289.

H. This court's inquiry in an action such as this brought under § 1415(e)(2) is twofold:

> First has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.

Rowley, 102 S.Ct. at 3051. In its inquiry, the court must make an independent determination based on a preponderance of the evidence, giving due weight to the state administrative proceeding. Id. at 3050.

I. The complaint in this action is devoid of any suggestion that the CISD did not comply with the procedures set forth in the IDEA. Therefore, the only issue to be decided by this court is whether the IEP developed for Bonnie was reasonably calculated to enable Bonnie to receive educational benefits. In this regard, the CISD's program is entitled to a presumption of appropriateness. See Tatro v. State of Texas, 703 F.2d 823, 830 (5th Cir. 1983) ("the central role of the IEP in the educational scheme contemplated by the [Act] and the standard of review developed in Rowley gives rise to a presumption in favor of the educational placement established by [the IEP]"), aff'd in part and rev'd in part, 468 U.S. 883 (1984); see also Alamo Heights Indep. School Dist. v. State Board of Educ., 790 F.2d 1153, 1158 (5th Cir. 1986); Christopher M., 933 F.2d at 1290-91. The burden therefore rests with the plaintiff, as the party attacking the placement, to show why the educational setting established by the IEP is not appropriate. Tatro, 703 F.2d at 830; Alamo Heights, 790 F.2d at 1158; Christopher M., 933 F.2d at 1291.

J. The overwhelming weight of the evidence establishes

that under the standard set forth in Rowley, Bonnie was receiving a free appropriate public education at the time Mr. and Mrs. F. removed her from enrollment in CISD's Regional Day School for the Deaf. The evidence shows that Bonnie had made, and was continuing to make, significant progress in her speech and auditory skills as a result of her experience in and individualized instruction provided by Ms. Jasper's class, together with the individual speech therapy provided by Ms. Brashear. Therefore, the IEP developed for Bonnie through the IDEA's procedures was reasonably calculated to enable her to receive educational benefits.

K. The plaintiff has framed this action as essentially a dispute over educational methodologies. Specifically, the complaint alleges that CISD failed to provide a free appropriate public education for Bonnie "because of the language or communication method used in the teaching methodology." Complaint, ¶ 4.01. However, the question presented in this action filed under § 1415(e)(2) and (e)(4)(A) is not whether an aural/oral methodology is generally superior to the total communication methodology in the education of hearing impaired children. "Philosophical debates concerning the best method of educating the hearing-impaired are best left to educators who consider this problem their metier." Visco v. School Dist. of Pittsburgh, 684 F. Supp. 1310, 1313 (W.D. Pa. 1988). As the Court stated in Rowley,

> In assuring that the requirements of the Act have been met, courts must be careful to avoid imposing their view of preferable educational methods upon the States. The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child.

102 S.Ct. at 3051. "A major part of the task of local and state officials in fashioning what they believe to be an effective program for the education of a handicapped child is the selection of the methodology or methodologies that will be employed." Lachman v. Illinois State Board of Educ., 852 F.2d 290, 296 (7th Cir.), cert. denied, 488 U.S. 925 (1988).

"[P]arents, no matter how well-motivated, do not have a right under the [Act] to compel a school district to provide a specific program or employ a specific methodology in providing for the education of their handicapped child." Id. at 297. Similarly, this action does not require the court to determine whether the methodology employed in instructing Bonnie allowed her to maximize her potential. See Christopher M., 933 F.2d at 1291 (district is not obligated to supply child "with the maximum benefit possible, but only to provide a meaningful education"). "Rowley makes clear that 'once a court determines that the requirements of the Act have been met, questions of methodology are for resolution by the State.'" Lachman, 852 F.2d at 294 (citation omitted).

L. Mr. and Mrs. F. have made a number of additional arguments in support of their contention that the CISD has violated the IDEA or applicable federal regulations thereunder. The court has reviewed these arguments in some detail. Some of these contentions result from either a misunderstanding of or mischaracterization of what the statute and/or regulations require, while others have simply been waived or are not supported by the record.

Mr. and Mrs. F argue that upon determining in February, 1991 that Bonnie would best be educated using an aural/oral methodology, the CISD had an obligation to provide that methodology on an "immediate" basis. Title 34 C.F.R. § 300.342, which they cite in support of their argument, provides that an IEP must be implemented "as soon as possible following the meetings under § 300.343."[9] While the Comment to §300.342 states that "it is expected that a handicapped child's individualized education program (IEP) will be implemented immediately following the meetings under § 300.343," the Comment also acknowledges that in certain circumstances, a delay will be tolerated, such as when the meetings occur during the summer or a vacation period, or

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[9]Title 34 C.F.R. § 300.343 requires public agencies such as the CISD to initiate and conduct meetings at least annually for the purpose of developing, reviewing, and revising a child's IEP, although it is clear that such meetings may be held more frequently than annually.

where transportation arrangements must be made. Whatever delays may be tolerated under § 300.342, however, is beside the point. Mr. F., who with Mrs. F. has pursued these proceedings on Bonnie's behalf, stated at the relevant time that he had no problems with Bonnie's IEP itself; rather, it was the methodology used for teaching Bonnie which he wanted altered.[10] To the extent that Bonnie's IEP was revised in February, 1991 -- a circumstance which has not been established, in this court's view -- the revision was implemented without undue delay when Ms. Jasper and Ms. Brashear ceased their use of signed English with Bonnie on an individual basis after the February, 1991 ARD Committee meetings.

Mr. and Mrs. F. also argue that the State of Texas has adopted for itself a standard for the education of hearing impaired children which exceeds the burden placed on the State by the IDEA. See Geis v. Board of Educ. of Parsippany-Troy Hills, Morris County, 774 F.2d 575, 583 (3d Cir. 1985 (State of New Jersey imposed a higher standard of special education than that required by the Act, where State Administrative Code required that handicapped pupils be provided a program "according to how the pupil can best achieve success in learning"). In support of this argument, they rely on Texas Educ. Code § 11.10(o)(6), which provides

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[10] 34 C.F.R. § 300.346 provides that an IEP must include:

(a) A statement of the child's present levels of educational performance;

(b) A statement of the annual goals, including short term instructional objectives;

(c) A statement of the specific education and related services to be provided to the child, and the extent to which the child will be able to participate in regular educational programs;

(d) The projected dates for initiation of services and the anticipated duration of the services; and

(e) Appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether the short term instructional objectives are being achieved.

in pertinent part as follows:

> (o) To carry out legislative intent . . . and the following subsections of this Section 11.10, the Central Education Agency shall employ a director and assistant director of services to the deaf. The director of services to the deaf shall develop and administer a comprehensive statewide plan for deaf education services including continuing diagnosis and evaluation, counseling and teaching, and designed to accomplish the following objectives:
>
> * * *
>
> (6) Recognizing the need for development of oral communications abilities in deaf children and the ability of many to achieve high educational excellence through that method, but also recognizing the inability of some to gain their education successfully by this means, the comprehensive plan developed by the director of services to the deaf will call for the use of methods of communication which will best meet the needs of each individual deaf child in this state, with each child to be examined thoroughly so as to ascertain his potential for communications through oral means. The director of services to the deaf may establish separate programs to accommodate diverse communication methodologies.

Mr. and Mrs. F. contend that this statute required CISD to provide a program employing an aural/oral methodology for Bonnie because this methodology would, in February, 1991, "best meet the needs" of her as an individual.

Mr. and Mrs. F. ignore the fact that the plan enacted by the State of Texas in compliance with the statutory directive contained in § 11.10(o)(6) -- the "Regional Program Evaluation Guide" -- does not require local school districts such as the CISD to have separate programs to accommodate different communication methodologies. Moreover, to the extent that this statute does impose a higher burden on Texas school districts than that imposed by the IDEA, it clearly allows for use of the "methods of communication" which will best meet

the "needs" of each individual child. This language recognizes that there may be more than one best method, and that children may have more than one need. In this case, the CISD agreed that for the remainder of the 1991 school year, two different methods would be used with Bonnie -- total communication and the aural/oral approach. Bonnie had certainly progressed in her skills under the former method, and the CISD agreed that she could likewise benefit from the latter method.[11]

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[11] Specifically, with respect to preschool programs for three and four year old hearing impaired students, the RPEG provides as follows:

1. The program operates the preschool program a minimum of three hours per school day.
2. The program provides annual goals and short-term instructional objectives for the consistent development of receptive language, expressive, auditory training, speech for the deaf, speechreading and other components of communication.
3. The classroom teacher is the primary instructor for speech, language and auditory training.
4. A speech and language pathologist/therapist is available to supplement the classroom teacher's speech, language, and auditory training programs.
5. The program provides annual goals and short-term instructional objectives for the consistent development of the social skills of the students.
6. All students enrolled in the preschool have completed SKI*HI, INSITE or a similar program. If not, they are being served by a parent advisor until they complete the program.
7. The average four year old is within one year of his hearing peers in expressive skills.
8. The average four year old is within one year of his hearing peers in receptive skills.
9. All students for whom amplification has been recommended wear appropriate amplification devices including hearing aids and/or Auditory Training Units.

The plaintiff has not established that any of these elements of

The ARD Committee did agree with Mr. and Mrs. F. and an aural/oral program would "best" meet Bonnie's needs, and they agreed to provide one--beginning in August, 1991. In the interim, they agreed that Bonnie would receive aural/oral individual instruction from Ms. Jasper and Ms. Brashear in a total communication environment. As the hearing officer correctly noted, this decision was made taking into account Bonnie's "need**s**," as §11.10(o)(6) requires. Bonnie is a human child with emotional as well as educational needs. The CISD considered the possible effect that abruptly removing her from Ms. Jasper's class would have, and determined that a "weaning" period, during which an aural/oral methodology would be used in a total communication environment, was what she needed. The court, having reviewed the testimony in the administrative record and heard additional live testimony, is convinced that those responsible for making this decision were sincere in having Bonnie's best interests at heart[12], that they acted appropriately in effecting Bonnie's gradual transition away from an accustomed mode of communication, and that they did not delay her progress.

Mr. and Mrs. F. also argue that the CISD failed in its duty to provide a continuum of alternative placements, as required by 34 C.F.R. 300.551. This contention is totally unsupported by the record. At the ARD Committee meeting held on

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the RPEG were not being satisfied.

[12]Nora Hancock, the Director of Special Programs for the CISD, perhaps stated the district's reasoning most persuasively:

> . . . And I think that one of the things that I know I kept thinking in my mind is, she was two. She had a trauma in her life. We provided her with signing. She became successful. She's thrived, she's becoming oral, and now here it is February. We're going to yank her where she's supported with people who love her and nurture her and just say, 'Now we've decided tie the hands. Do this. Here it is.' I just--Bonnie is more than just speech language and auditory skills. She's a total child. And I don't think you can separate that.

Transcript of Administrative Hearing, May 15, 1991 at 170.

February 12, 1991, different possibilities for Bonnie's placement--including private nursery school (at district expense) and a pre-kindergarten placement at Magee Elementary--were suggested to Mr. F. However, it is apparent from the record that he was not interested in pursuing these alternative placements on behalf of his daughter.

Mr. and Mrs. F. additionally argue that the CISD failed in its duty to provide Bonnie with a placement at the school nearest to their residence, i.e., the school which Bonnie would normally have attended, in violation of 34 C.F.R. 300.552. However, this is not what 34 C.F.R. 300.552 requires in every instance. Rather, it requires that placement be determined at least annually, and that it be located "as close as possible to the child's home." Moreover, § 300.552 provides that "[u]nless a handicapped child's [IEP] requires some other arrangement, the child is educated in the school which he or she would attend if not handicapped." The record does not indicate that Mr. and Mrs. F. expressed dissatisfaction with the location of Bonnie's placement--in Ms. Jasper's classroom at the somewhat distant Calk Elementary--at the beginning of the 1990-1991 school year when Bonnie was placed there. The record clearly indicates that the parents' expressed difficulty with the program at Calk after February, 1991 was not its location, but its methodology. In addition, the record clearly indicates that the ARD Committee proposed sending Bonnie to a pre-kindergarten program at her home school--Magee Elementary--but that Mr. F. expressed no interest in this placement. Accordingly, the court concludes that the issue of non-compliance with § 300.552 has been waived.

Mr. and Mrs. F. have also argued that the court should conclude that the CISD failed to meet the mainstreaming requirements of 20 U.S.C. § 1412(5)(b).[13] This argument,

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[13]This section requires states to establish

> . . . procedures to assure that, to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and that special classes, separate schooling,

however, contradicts the plaintiff's admission that at the administrative hearing the parties agreed that mainstreaming during 1991 was not an issue. Amended Joint Pretrial Order at 11, ¶ KK. Clearly, mainstreaming was not an issue for Bonnie in 1991 as far as her parents were concerned; they refused to pursue mainstream placements suggested by the ARD Committee (which included placement in a private nursery school at district expense), and instead placed their daughter in a school for the deaf located in San Antonio. Their goal, which has now been achieved, was that Bonnie would be eventually mainstreamed in a regular kindergarten. Because they did not seek mainstreaming for Bonnie in 1991 and did not raise this issue at the administrative hearing, Mr. and Mrs. F. have waived this issue on behalf of their daughter.

N. Finally, Mr. and Mrs. F. have proposed that the court conclude that Bonnie's Fourteenth Amendment rights were abridged insofar as the State of Texas has discriminated against her by failing to provide her with the same educational opportunities available to other hearing impaired students who reside in other parts of Texas. However, assuming that such discrimination had been established by competent evidence of what opportunities are provided to children in other locales, the State of Texas is not a defendant in this proceeding. Rather, the defendant is a local educational agency, and the record does not suggest that this defendant has control over whether different programs for hearing impaired students may be provided in other regions in the State. Accordingly, the court finds this argument to be without merit.

CONCLUSION

The program provided for Bonnie by the CISD was appropriate and reasonably calculated to enable her to ultimately enter kindergarten with other children her age. That Bonnie's parents, in particular Mr. F., may have developed an aversion to the total communication environment provided by

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or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in the regular classes with the use of suppiementary aids and services cannot be achieved satisfactorily[.]

the program does not, however, entitle them to reimbursement for Bonnie's private schooling in accordance with Burlington. As parents, Mr. and Mrs. F. should be lauded for making the sacrifices involved in expending their own funds in order to send their daughter to a school which they believed to be the best available for her--one which they believed would assure her abrupt abandonment of signing and prevent her future association with the "deaf subculture." However, the Act contemplates that parents--even those who harbor the best of intentions--who unilaterally change their child's placement during the pendency of review proceedings without the consent of school officials do so at their own financial risk. 105 S.Ct. at 2004.

Accordingly, the court concludes that the decision of the hearing officer shall stand, that a judgment of no cause of action shall be entered, and that the defendant shall recover of the plaintiff its cost of action.

So ordered this 9th day of September, 1993.

s\Wendell A. Miles, Senior Judge
Sitting by Designation

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED
SEP 20 1993
Michael N. Milby, Clerk
By Deputy s\M. Fegan

CLERK, U.S. DISTRICT COURT
RECEIVED
SEP 17 1993
SOUTHERN DIST OF TEXAS
CORPUS CHRISTI, TEXAS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

BONNIE ANN F., by her next friends
JOHN R. and KAREN A. F.,
Plaintiff,

v. Civil No. C-91-259

CALALLEN INDEPENDENT SCHOOL DISTRICT,
Defendant.
_____/

ORDER ON DEFENDANT'S SECOND MOTION FOR SANCTIONS

This matter is before the court on the defendant's Second Motion for Sanctions (docket no. 69). The plaintiff has filed no written response to this motion.[1] Upon due consideration, and in accordance with Rule 6(E) of the Local Rules for the United States District Court for the Southern District of Texas, the

[1] Plaintiff likewise filed no response to defendant's previous motion for sanctions, filed November 10, 1992.

court hereby **GRANTS** defendant's request for leave to file this motion and **GRANTS** the motion for sanctions.

In its motion for sanctions, defendant the Calallen Independent School District ("CISD") seeks imposition of sanctions against the plaintiff for the following conduct:

1. filing documents with the court and failing to provide copies to CISD in contradiction of the certificate of service;

2. altering jointly submitted documents (namely, the joint pretrial order) without notice to or approval by CISD;

3. violating the court's order of February 20, 1992 and the court's rulings of February 13, 1992 and September 18, 1992 regarding the submission of additional evidence beyond the evidence contained in the administrative record.

CISD seeks sanctions totalling $5,667.33 for costs and attorney's fees incurred as a result of attempts to respond to plaintiff's conduct. This amount has been supported by affidavit of counsel. Although this is CISD's second motion for sanctions, plaintiff has failed to respond to any of the claims made concerning the conduct of this litigation and the increased expenses caused thereby. Under the circumstances, given that Local Rule 6(E) specifically provides that the failure to respond to a motion will be taken as a representation of no opposition, and given that the plaintiff has had ample time to respond, the court finds that the plaintiff has committed the sanctionable conduct alleged and that the CISD is entitled to an award of sanctions against plaintiff. The court further finds that the amount of fees and costs sought is reasonable, with one exception. Specifically, the court finds that the seventeen hours of attorney time spent on preparation of the motion is excessive, and reduces the amount to seven hours, or $770. Therefore, the court awards sanctions in the total amount of $4,567.33 as reasonable costs and attorney's fees incurred as a result of plaintiff's conduct. The court's authority for imposition of these sanctions is contained in Fed.R.Civ.P. 11 and Fed.R.Civ.P. 16(f).

IT IS THEREFORE ORDERED that defendant's Second Motion for Sanctions is GRANTED, and that plaintiff, or plaintiff's counsel, C. L. Wright, III, shall pay to defendant CISD the sum of $4,567.33 in attorney's fees and costs incurred as a result of the sanctionable conduct.

So ordered this 9th day of September, 1993.

s\Wendell A. Miles, Senior Judge
Sitting by Designation

APPENDIX D
DOCKET NO. 203-SE-391

BONNIE ANN F. B/N/F JOHN R. AND KAREN A. F.	)	BEFORE A
	)	SPECIAL EDUCATION
VS.	)	
	)	HEARING OFFICER
CALALLEN INDEPENDENT SCHOOL DISTRICT	)	FOR THE STATE OF TEXAS

DECISION OF THE HEARING OFFICER

BONNIE ANN F. ("Bonnie" or "Petitioner") bnf John R. and Karen A. F., brings this appeal pursuant to the Individuals with Disabilities Education Act (hereinafter "the Act"), 20 U.S.C. Section 1401, et seq., complaining of her placement by the Calallen Independent School District (hereinafter "the district") and asking for reimbursement for a unilateral parental placement.

Petitioner's request for hearing was received by the Office of the Commissioner of Education for the State of Texas on March 4, 1991. Petitioner is represented by Mr. C. L. Wright, III, of the law firm of Sandra L. Watts & Associates, P.C., Corpus Christi, Texas; Respondent is represented by Ms. Elena Gallegos, of the law firm of Walsh, Judge, Anderson, Underwood & Schulze, P.C., Austin, Texas. The hearing was originally scheduled for March 19, 1991; however, both parties requested continuances. The hearing was rescheduled to April 11, 1991; and again both parties requested continuances to May 17, 1991. The parties requested the opportunity to file post-hearing briefs. The parties further agreed that a reasonable time to receive a written opinion would be by August 1, 1991.

Statement of the Case

On May 3, 1989, Bonnie F., almost two, lost her hearing due to spinal meningitis.

In August of 1989, Bonnie began receiving services from the Regional Day School for the Deaf ("RDSD") through Calallen Independent School District ("CISD"). In the Spring

of 1991, Bonnie had a cochlear implant. Following the implant, steady and significant was her progress through CISD and RDSD.

In February, 1991, Bonnie's parents asked the school district to remove Bonnie from total communication into an all oral/aural program. The school district did not; instead they mixed methodologies -- some total communication and some oral/aural -- for March, 1991, and planned to continue the same program for April and May, 1991; but the parents removed Bonnie at the end of March, 1991, and unilaterally placed her at Sunshine Cottage in San Antonio, Texas, which is strictly oral/aural. The parents bring this action seeking reimbursement for the unilateral private placement.

Findings of Fact

From the testimony and documentary evidence, the Hearing Officer makes the following Findings of Fact:

1. Bonnie, age 4, was born on May 21, 1987, and she is a resident of the Calallen Independent School District. Order of May 2, 1991 stipulation.

2. Bonnie is auditorily disabled. Order of May 2, 1991 stipulation.

3. On May 3, 1989, Bonnie, almost two, contracted spinal meningitis and suffered a profound loss of hearing in both ears. [Tr. I, p.25].

4. On August 10, 1989, testing indicated that Bonnie had no detectable hearing. [Tr. I, p. 26].

5. The parents immediately started a Parent-Infant program through Respondent District. [Tr. I, p. 26].

6. Bonnie received a Nucleus-22 cochlear implant in mid-March, 1991, and the implant was energized and tuned-up on April 28, 1990. [Tr. I, p. 35].

a. Sounds that are heard through the cochlear implant do not sound exactly like the sounds people with normal hearing experience. [Tr. I, p. 77].

b. Implant users go through significant relearning following the implant. [Tr. I, p. 78].

c. The cochlear implant is not a bionic ear in the sense of an exact mechanical electrical replacement in the hearing system. [Tr. I, p. 78].

d. The cochlear implant does not restore normal

hearing. [Tr. I, p. 78].

e. The cochlear implant is a new technology. During the summer of 1990, it was approved by the FDA for general application to hearing impaired children who had a certain specified degree of hearing loss. [Tr. I, p. 82]. During the year prior to its approval for general application, it was approved on an investigational basis for implementation in children who had had profound hearing loss. [Tr. I, p. 82].

7. After the cochlear implant, Bonnie made significant progress in her speech development. [Tr. 1, p. 36].

8. During the 1990-1991 school year, Bonnie was in Ms. Susie Jasper's class, a self-contained classroom at Calk Elementary School. Calk Elementary School is a regular elementary school in the Corpus Christi Independent School District. [Tr. II, p. 210]. Corpus Christi Independent School District is the fiscal agent of the Regional Day School Cooperative that serves children who are auditorily handicapped. [Tr. II, pp. 209-210]. Respondent School District is a member of the cooperative [Tr. II, p. 210].

9. The students in Ms. Jasper's class are three and four years old. [Tr. III, p. 90]. At the time Bonnie was enrolled in Ms. Jasper's class, there were five students. [Tr. III, p. 90]. There were two adults in the class, Ms. Jasper and a paraprofessional. [Tr. III, p. 90].

10. The instructional methodology used in the class is total communication. Jasper, [Tr. III, p. 92]. Total communication is a multimodal, multichannel method of instruction for speech, listening, language and academic development of hearing impaired children. Bernstein, [Tr. III, pp. 218-220]. Total communication is different from oral-aural methodology in that total communication uses simultaneous signing of English along with oral production [Bernstein, Tr. III, p. 219].

11. Bonnie communicated at the beginning of the year through total communication. [Tr. III, p. 124]

12. Six months after the implant, evaluation results (December 28, 1991) were: Bonnie's language age was assessed at 3 years, 3 months on a receptive vocabulary test, and at 3 years, 7 months on an expressive vocabulary test, and at 3 years on an expressive English syntax test.

Bonnie was 3 years, 7 months old at the time of the evaluation. [R. Exh. 7, pp. 2-3].

13. Petitioner was making good progress in Mrs. Jasper's class. [Tr. I, pp. 76-77; Tr. II, pp. 31, 32, 91; Tr. II, pp. 169, 230, 232; Tr. III, pp. 192, 293].

a. Before Petitioner's withdrawal from Ms. Jasper's class, her language and speech increased significantly. She was speaking and signing in three, four, five word utterances, usually with proper word order [Tr. III, p. 91].

b. Petitioner made progress on her auditory learning goals in Ms. Jasper's class. [Tr. III, pp. 158, 180-186].

c. Petitioner made progress on her language arts goals in Ms. Jasper's class [Tr. III, pp. 158-162].

d. Petitioner made progress on her readiness goals in Ms. Jasper's class. [Tr. III, pp. 163-173].

e. Petitioner made progress on her social/emotional goals in Ms. Jasper's class. [Tr. III, pp. 175-177].

f. Petitioner made progress on her social science goals in Ms. Jasper's class. [Tr. III, pp. 177-179].

g. Petitioner made progress on her math goals in Ms. Jasper's class. [Tr. III, pp. 179-180].

14. On February 8, 1991, Bonnie's parents obtained an evaluation of her from Ms. Linda Daniel, the director of the TALK Center in Dallas, Texas, which provides therapy and training to hearing impaired children directed to the development of spoken English without sign language. [Tr. I, p. 45].

15. Following recommendations of Ms. Daniel, Bonnie's parents requested an Admission, Review and Dismissal ("ARD") Committee meeting, which was held on February 12, 1991 [Tr. II, p. 213], at which Petitioner requested that an oral-aural placement be provided without exposure to sign language. [Tr. I, pp. 44-46; Tr. II, p. 214.]

16. A variety of options regarding programming and placement were discussed with the parents,. including placement in an early childhood special education class at Bonnie's home campus [Tr. II, p. 216] and placement at a private nursery school for mainstreaming [Tr. II, p. 217].

17. After a recess requested by Petitioner, the ARD

Committee reconvened on February 28, 1991. Petitioner's father stated that he did not have any argument with the IEP itself, [Tr. III, p. 146]; [see also ARD minutes, pp. 9 of 11, 10 of 11, P. Exh. 11]; but requested that an oral/aural separate program be provided. [see ARD p. 3 of 11, P. Exh. 11]. At the February 28, 1991 ARD Committee meeting, Petitioner's father presented the ARD Committee with a letter requesting a due process hearing. [See P. Exh. E.]

18. As of the end of February or the beginning of March, 1991, an oral/aural methodology would best meet Bonnie's needs.[P. Exh. E].

19. By letter dated March 6, 1991, the district stated to the Petitioner that: "...the 'ARD' members had agreed that an auditory-oral model would be the methodology which would best meet Bonnie's current needs." [Tr. II, p. 50, P. Exh. E].

20. The February 28, 1991 ARD Committee decided that Petitioner's teacher and speech therapist would not use the sign language component of total communication with Petitioner when working with her on an individual basis. Bonnie would receive mixed methodologies for March-May, 1991, in a transitioning from total communication to an oral/aural setting which is to begin in August, 1991. [Tr. II, pp. 32, 40; Tr. III, p. 130].

21. On April 1, 1991, Bonnie's parents unilaterally placed her in Sunshine Cottage School for the Deaf in San Antonio, Texas, where an oral/aural methodology is used, rather than total communication. [Tr. I, p. 52].

22. The district's current plan for the 1991-92 school year for Petitioner is to place her in a newly developed oral-aural program at Magee Elementary School, Petitioner's home school. [Tr. I, p. 73].

23. The transitioning period planned for Bonnie for March - May, 1991, was reasonable and tailored to Bonnie's needs, development, age and history. [Tr. I, pp. 50, 76, 77; Tr. II, pp. 168-170, 173-174; Tr. II, pp. 31-34, 40, 50-51; Tr. III, pp. 275-276, 293-295; R. Exh D, p. 3 of 11; R. Exh E., p. 4].

24. The mixed methodology transitioning period was a timely and reasonable compliance with Section 11.10(o)(6) of the Texas Education Code.

25. There is no evidence to support a finding that, before

February, 1991, Bonnie could have successfully achieved in oral/aural methodology alone; however, it is a finding that Bonnie was successfully educated in the total communication methodology until March, 1991, at which time she began receiving mixed methodologies. [Tr. II, p. 32].

26. When Bonnie was removed by her parents at the end of March, 1991, she was receiving an appropriate education in an appropriate placement.

27. Bonnie was dependent on total communication from shortly after she became deaf until many months following her implant, during which time she made great strides. [See testimony of Mr. F., Mrs. F., Ms. Jasper, Ms. Hancock, Ms. Brashear.]

DISCUSSION

In preparing this opinion, the Hearing Officer recognizes the problems, as the Court in Visco v. School District of Pittsburgh, 684 F.Supp. 1310 (1988), recognized when it stated: "... this Court is mindful of the problems encountered by the hearing-impaired in acquiring sufficient language skills to function in society. In fact, this problem has risen to the level of national epidemic."

For many years deaf education advocates have suggested different methodologies, including total communication and oral/aural. Some swear by total communication; some swear by oral/aural. Experts, colleges institutions and educators are found supporting each side. "Education of the hearing-impaired has been plagued by debates since the eighteenth century concerning which method of teaching is best." Visco v. School District of Pittsburgh, 684 F.Supp. 1310 (1988).

The Texas Legislature in 1973, assisted by studies by the Texas Education Agency and significant citizen and deaf associations input, considered the then current status of deaf education in the state and found it in need of stepped-up attention. Although the state had a centralized school for the deaf, some county-wide public deaf programs and some private facilities, many of the state's deaf children were facing inadequate educational opportunities and accommodations. The Legislature was presented with Senate Bill 803, which established Regional Day Schools for the Deaf intended to

blanket the state with public education for the deaf.

Legislative history, including house debate, house bill sponsor's assurances to colleagues and prior t ll history, clearly shows that the legislative intent and desire of the Legislature was to end years of legislative quagmire over the question of preferred methodologies (2nd & 3rd reading of Senate Bill 803 in House of Representatives, State of Texas, 5/25/73). The Legislature had been slowed by competing methodologies to the detriment of providing well-enough for the deaf of the state. Expressing these sentiments and recognizing their lack of expertise in deciding among methodologies for deaf education, the Legislature shifted this question from the halls of the Legislature to the experts, who were charged with the duty of thoroughly examining each deaf child to determine the best methodology for that child.

In 1973, the Texas Legislature approved Senate Bill 803 and enacted Section 11.10, Texas Education Code, as amended, by adding Subsections (n) through (u) , which now reads, in part, as follows:

"(n) The Legislature intends to continue a process of providing better education available to deaf children on a state-wide basis in Texas, and to afford all deaf children an opportunity for achievement more equal to their peers with normal hearing.

"(o) To carry out legislative intent and the objectives, the Central Education Agency shall employ a director of services to the deaf. The director shall develop and administer a comprehensive statewide plan for deaf education services including continuing diagnosis and evaluation, counseling and teaching, and designed to accomplish the following objectives:

. . .

"(6) Recognizing the need for development of oral communications abilities in deaf children and the ability of many to achieve high educational excellence through that method, but also recognizing the inability of some to gain their education successfully by this means, the comprehensive plan developed by the director of services to the deaf will call for the use of

> methods of communication which will best meet the needs of each individual deaf child in this state, with each child to be examined thoroughly so as to ascertain his potential for communications through oral means. The director may establish separate programs to accommodate diverse communication methodologies."

The question herein involves the impact of Section 11.10(o)(6) upon the requisites of an appropriate education for Bonnie. Texas qualifies for assistance from the federal government under the I.D.E.A., 20 U.S.C. Section 14.01, et seq. To qualify, a state must demonstrate that it has in effect a policy that assures all handicapped children the right to a free appropriate public education. That policy must be defined in a state plan submitted to and approved by the State Department of Education. 20 U.S.C. Section 1412(1); Geis v. Board of Education of Parsippany-Troy Hills, 774 F.2d 575 (1985).

Texas has submitted its state plan to the U.S. Dept. of Education pursuant to the requirements of the Act. The state plan is one integral part of the total state design for the delivery of services to all students with handicaps. State Board of Education rules incorporate all state and federal laws and regulations applicable to the education of students with handicaps. The content of this state plan directly tracks federal regulations, state statutes, and State Board of Education rules. State Plan, p. vii.

By Executive Order 12372, the State of Texas certifies that it will comply with the State Plan. See State Plan.

The Act incorporates the standards of the state education agency, and state standards are incorporated also when they are more demanding than the standards of the federal Act. Board of Education of the East Windsor School District v. Diamond, 808 F.2d 987 (3rd Cir. 1986); Geis v. Board of Education of Parsippany-Troy Hills, 774 F.2d 575 (1985).

A free appropriate public education requires the meeting of state standards. 20 U.S.C. 1401(18)(B); Board of Education of the East Windsor School District v. Diamond, 808 F.2d 987 (3rd Cir. 1986) Geis v. Board of Education of Parsippany, 774 F. 2d 575 (1985); Students of California School for the Blind v.

Honig, 736 F.2d 538 (9th Cir. 1984), vacated on other grounds, 105 S.Ct. 1820 (1985); Hendrick Hudson District Board of Education v. Rowley, 458 U.S. 176, 73 L.Ed.2d 690, 102 S.Ct. 3034 (1982); Visco v. School District of Pittsburgh, 684 F.Supp. 1310 (1988).

When the Act defines free appropriate public education, in part as meeting the standards of the state education agency, does that mean all standards? The 9th Circuit in Honig dealt with this question, but not exhaustively so. The Court in Honig accepted the Petitioner's argument that the state standards of seismic safety of physical structures were incorporated by the Act; and, therefore, a definitional ingredient of a FAPE. The Court agreed with the Petitioner's reasoning that the Act does not specifically provide for textbooks, writing materials or appropriately trained teachers, but the Act does incorporate the state standards that provide those items. The Court further pointed out that in an earlier decision, it had held that physical safety was considered a part of an appropriate education under the Act in Mountain View-Los Altos Union High School District v. Sharron B. H., 709 F.2d 28, 30 (9th Cir. 1983).

This Hearing Officer recognizes degrees of importance, central vs. tangential issues; minutiae and the like can be and are characteristically a part and parcel of the body of standards. Certainly minutiae in state standards should not be held as critical and necessary ingredients to the finding of a delivery of a FAPE. However, in the instant case, we are looking at a state standard which is at the opposite end of the pendulum swing from minutiae -- we are at the fundamental standard of a method of communication for a deaf child. Accordingly, it is clear as light that this state standard is one intended by the Act to be included in the definitional content of a FAPE.

The State Plan of Texas includes Texas Education Code Section 11.10(o)(6). Appendix B: *Right to Education Policy Statement, State Plan.*

The local school district has the duty to implement Section 11.10(o)(6) for Bonnie.

For the hearing-impaired student for whom the ARD Committee has recommended services through a

Regional Day School for the Deaf... . The sending school district remains ultimately responsible for ensuring that a free appropriate education is provided to the student.

19 T.A.C. Section 89.221(f).

In accordance with Texas Education Code Section 11.10, local school districts shall have access to Regional Day Schools for the Deaf.... Any student who has a hearing impairment which severely impairs ... shall be eligible for consideration for the Regional Day School for the Deaf subject to the admission, review and dismissal (ARD) Committee recommendations.

19 T.A.C. Section 89.201(a).

Special education services shall be provided to eligible students in accordance with applicable federal law and regulations, state statutes, and the rules in this subchapter.

Subchapter G., Special Education.

The State standard requires that each deaf child shall be thoroughly examined to ascertain his potential for oral communications. Texas Education Code, Section 11.10(o)(6).

The State standard recognizes the need for development of oral communications abilities in deaf children and the ability of many to achieve high educational excellence through oral communication. Texas Education Code, Section 11.10.

The State standard requires the use of methods of communication which will best meet the needs of each individual deaf child.

By Section 11.10(o)(6), the State of Texas has not statutorily increased the standard of education to a level higher than that which the U.S. Congress created in the Act and its predecessors as interpreted by the U.S. Supreme Court in Hendrick Hudson District Board of Education v. Rowley, 458 U.S. 176, 73 L.Ed.2d 690, 102 S.Ct. 3034 (1982). It has, however, statutorily in Education Code Section 11.10, provided that each individual deaf child in the state will be thoroughly examined to determine that individual child's preferred method of learning. The statute says the best method of communication should be determined for each child.

In a line of cases under the Act and its predecessors,

courts caution and self-caution, and urge restraint when considering methodology. Courts favor methodology being left to the states and their educators. Lachman v. Illinois State Board of Education, 852 F.2d 290.

Congress largely left it to the states to determine educational policy. Rowley, 102 S.Ct. at 3051; Abrahamson v. Hershman, 701 F.2d 223 (1983), and 95 Harv. Rev. 1103, 1108 (11979). Courts must "be careful to avoid imposing their view of preferable educational methods upon the states. ...it might be inappropriate... to impose a particular methodology upon a state." Rowley, 102 S.Ct. at 3051.

Philosophical debates concerning the best method of educating the hearing-impaired are best left to educators who consider this problem their metier. Visco v. School District of Pittsburgh, 684 F.Supp. 1310 (1988). It is not the Court's duty to determine which competing methodology is best, but whether the educational method proposed by school district was appropriate. Id.

The instant case is different, for the Legislature has specifically stated that methodology as to each deaf child shall be determined; and that services to that child will call for the use of methods of communication that are best for that child. Accordingly, methodology determination and use is a right of that child and a duty of the State. It is, therefore, a central issue that cannot and should not be avoided.

It would be very easy to determine on this record that Bonnie was receiving a free appropriate public education (FAPE) if Section 11.10 of the Texas Education Code were not present. It is easy to find that Bonnie was receiving a special education pursuant to an IEP which was calculated to render educational benefit to her. Rowley, 102 S.Ct. at 3051. She was educationally benefitting very well. All were proud of her success.

If Section 11.10 is applicable to both the Local Education Agency ("LEA") and the State Education Agency ("SEA") herein, then the LEA has the duty to "use methods of communication which will best meet the needs of Bonnie F." The district then has the duty to ensure that Bonnie "be examined thoroughly so as to ascertain her potential for communications through oral means." The district, through its

ARD process and its consideration of reports from the parents, Houston Ear Research Foundation, Linda Daniels (consultant to the parents), its teachers and staff, made the determination that Bonnie has high potential for communication through oral means. Using language similar to Section 11.10, the school wrote a letter to the parents on March 6, 1991, that read in part:

> "...the 'ARD' members had agreed that an auditory-oral model would be the methodology which would best meet Bonnie's current needs." [P. Exh. E]

It would accordingly follow that the district then had the duty to "use methods of communication which would best meet Bonnie's high potential for communications through oral means. If the ARD Committee stated their findings on February 28, 1991, was Bonnie entitled to an oral/aural program immediately on March 1, 1991? Did her continued physical placement in Mrs. Jasper's class with continued exposure to some sign language constitute an inappropriate placement or inappropriate education so as to justify unilateral parental removal, private placement and reimbursement?

When the parents of the child asked the school district for a strict oral/aural program, the district agreed. Both the district and the parents agreed that an oral/aural model would be the methodology which would best meet Bonnie's current needs. [P. Exh. E]. The district ARD committee agreed to place her in an oral/aural communications program beginning in August, 1991; and to transition her from total communication in March, April and May, 1991. Beginning March, 1991, the ARD Committee decided that Bonnie would receive only oral/aural communication and instruction from her teacher and presumably from the aide and from the speech therapist. She was, of course, still exposed to signing when the teacher was instructing the class as a whole and when the other students communicated with sign. Because of the age of the other students, i.e. three and four, interactive signing was not significant. (Tr. IV, pp. 79-80, Dr. Bernstein]. Thus, the district included times, i.e., one-on-one teacher-student and speech therapist-student time periods, in which Bonnie would receive the oral/aural methodology. [Tr. II, p. 51; Tr. III, pp. 120, 130; Tr. III, p. 293; P. Exh. 4]. The father of the child, not wanting

her in a "signing environment," removed her shortly thereafter.

Bonnie had been in a total communication methodology until the February 28, 1991 ARD Committee meeting. She had relied on that methodology since August, 1989, for communication. After the February, 1991 ARD Committee meeting, she received oral/aural methodology for parts of the day and total communication methodology for parts of the day. The district planned to continue this mixed methodology for the months of March, April and May, 1991. At the end of March, 1991, Bonnie was removed from her district placement by her parents, who unilaterally placed her at Sunshine Cottage in San Antonio, Texas. Sunshine Cottage adheres to a strict oral/aural methodology. No signing is allowed.

The February ARD Committee members considered the need for a transitioning period for Bonnie, i.e., from Mrs. Jasper's class of total communication to an all oral/aural classroom, and decided that it would be prudent to have Bonnie remain in Mrs. Jasper's class for the remaining three months. The ARD Committee considered that in three months, three year old Bonnie's use of signing would arguably decrease and use of totally oral communication would arguably increase.

In achieving this, the committee planned to keep Bonnie in Ms. Jasper's class while introducing portions of a strictly oral/aural instruction accompanied by some total communication instruction. [See P. Exh. E, p. 4; P. Exh. D, p. 3 of 11].

The Texas statute calls for the use of methods of communication which will best meet the needs of Bonnie. The ARD Committee was also charged with delivering an appropriate program of education. In such a delivery, the State of Texas has added that it should be delivered utilizing methods of communication which best meet Bonnie's needs. Human needs are many and multidimensional. The ARD Committee must consider the whole of the learning child when they consider an IEP and an accommodating placement. In this instance, it appears very reasonable that the ARD Committee planned a three-month transition period in the final one-third of the school year when Bonnie had gone through so much and while she was in a comfortable relationship with a good teacher. [Tr. I, pp. 50, 76, 77; Tr. II, pp. 168-170, 173-

174; Tr. II, pp. 31-34, 40, 50-51; Tr. III, pp. 275-276, 293-295; R.Exh D, p. 3 of 11; R. Exh E., p. 4].

In Visco, the Court considered the effect of a change of programming from oral/aural to total communication. The Court urged a great deal of caution.

> Once a student is making good progress in a particular program, a change must be viewed with a great degree of caution. In balancing the potential benefits against the potential harms, even if the benefits and the harms were to weight equally, the child in question should not be moved from one program to another.
>
> Judge Dumbauld recognized the wisdom of this cautious approach to changing a deaf student's educational program where the change would entail a new method of educating the hearing impaired, *Grkman v. Scanlon,* 528 F.Supp. 1032 (W.D.Pa. 1981). In that respect, Judge Dumbauld faced the same issue that is before this court in the instant case.
>
> . . . At present, Lindy is making satisfactory progress in her present educational environment. It is important to maintain 'momentum.' The risks of change outweigh the possible benefits [emphasis added]. Grkman at 1037.

This case's controversy arose quickly and, within a month or two, the child had been removed. It is not the same as if the child should have been identified much earlier in her education to be eligible for another methodology but had been denied and thereby injured or slowed. The district was not remiss before February 28, 1991, in identifying Bonnie as needing oral/aural method of communication. Bonnie was young, almost a toddler, who had been totally without hearing for approximately a year. She then received an implant that began to restore her hearing, and within nine or ten months, she was rapidly regaining communications ability. Spurred on by an oral/aural advocate, the Petitioner approached the ARD Committee in February, 1991, and they agreed that Bonnie had become a child that they believed could benefit from the oral/aural model. Bonnie had progressed rapidly during the 1990-91 school year. There is nothing in the record to indicate that the total communication method before February, 1991,

was not the best for Bonnie's needs. If she had progressed to the state of being more appropriate for oral/aural methods much before February, 1991, it is not apparent. It appears to the contrary. Because of the rapid progress of Bonnie, the ARD Committee chose not to suspend that momentum, but to offer her a transitional environment in which they did use the best method of communication, i.e., oral/aural method, but not exclusively. There is no presented authority, decisional, statutory, or regulatory, nor is there compelling evidence that oral/aural and total communication methodologies cannot be mixed in a transitional phase. Of course, in any given moment, they are mutually exclusive. Here the two methodologies were not instructionally delivered simultaneously within a given moment but were segregated into time periods.

The district did exercise caution; the ARD Committee did consider the effect of the change of educational methods upon Bonnie. Therefore, the district did achieve the duty called for under Section 11.10, i.e., they did use methods of communication which best met the needs of Bonnie. They mixed their methods of communication and they started stressing to Bonnie more of an oral/aural methodology than they had used before; and they agreed to present only the oral/aural methodology after three more months of school.

Teachers, staff and parents all testified that Bonnie was making wonderful progress. Everyone was pleased with her progress in Ms. Jasper's classroom. The school was not notified until shortly before the February ARD Committee meeting that a change of placement was desired, and within a few short weeks, Bonnie had been removed.

A transition period may not be reasonable if she were drowning in one environment or if it were shown that continued placement in the environment would produce irreparable harm or unacceptable risks of harm. The evidence indicates there was no harm or unacceptable risk to Bonnie being continued in Ms. Jasper's classroom in a mixed methodology while transitioning into an oral/aural method of communication in August, 1991. Tr. III, p. 295. The evidence shows the opposite - remarkable progress. The mixed methodology utilized in March, 1991, for transitioning was reasonable for

Bonnie. A transitioning period is reasonable when the child is considered to benefit from same. Here, the environment within which she would be transitioning was an environment in which she had been progressing quite well. If retention in the environment were shown to be significantly injurious, then the time in which she was to be removed would accordingly be required to be brief. Bonnie's prognosis for April and May as to educational progress was very good.

Accordingly, the educational services to Bonnie prior to her removal from the district at the end of March, 1991, are found to be appropriate and also consistent with the methodology criteria in Section 11.10(o)(6), and consistent with the duty owed by the district. A parental violation of the "stay-put" provision of Section 1415(e)(3) of the Act does not constitute a waiver of reimbursement. If, on hearing, the educational placement called for by the District's IEP is shown to be an inappropriate placement, then the parents may be entitled to reimbursement. Burlington School Committee v. Department of Education, 471 U.S. 359 (1985).

> ... parents who unilaterally change their child's placement during the pendency of review proceedings, without the consent of state or local school officials, do so at their own financial risk. If the Courts ultimately determine that the IEP proposed by the school officials was appropriate, the parents would be barred from obtaining reimbursement for any interim period.

Id. at _____; 34 CFR, Section 300.403(a)(b).

> In dictum the Court suggested, however, that a lack of parental consultation with the Town or 'attempt to achieve a negotiated compromise and agreement on a private placement,' as contemplated by the Act, 'may be taken into account in a district court's computation of 'an award of equitable reimbursement.'"

U.S. S.Ct. in Rowley, commenting on Ct. of App. for the Ist Cir., 736 F.2d 773 (1984).

> (a) If a handicapped child has available a free appropriate public education and the parents choose to place the child in a private school or facility, the public agency is not required by this part to pay for the child's education at the private school or facility... .

(b) Disagreements between a parent and a public agency regarding the availability of a program appropriate for the child, and the question of financial responsibility, are subject to the due process procedures under [Section 1415].

34 CFR Section 300,403 (1984).

It follows, therefore, that reimbursement relief sought by the Petitioner for the unilateral parental placement of Bonnie at Sunshine Cottage cannot be supported.

Conclusions of Law

1. Bonnie is entitled to a free, appropriate public education from CISD. 20 USC 1400, et seq.

2. Bonnie was receiving a free, appropriate public education from CISD until she was withdrawn by her parents.

3. Bonnie is entitled to be thoroughly examined so as to ascertain her potential through oral means. Section 11.10(o)(6) Texas Education Code. She was so examined and found to be a child for whom an oral/aural method of communication would best meet her needs.

4. Methodology is a component part of an appropriate education, the choice of which is usually reserved for the educational authorities; however, the State of Texas calls for the use of methods of communication which best meet the needs of each individual deaf child. Lachman v. Ill. State Board of Education, 852 F. 2d 290; Section 11.10(p)(6) Texas Education Code.

5. The Act incorporates the standards of the state education agency, and state standards are incorporated also when they are more demanding than the standards of the federal Act. Board of Education of the East Windsor School District v. Diamond, 808 F. 2d 987 (3rd Cir. 1986) ; Geis v. Board of Education of Parsippany-Troy Hills, 774 F.2d 575 (1985).

6. A free appropriate public education requires the meeting of state standards. 20 U.S.C. 1401(18)(B); Board of Education of the East Windsor School District v. Diamond, 808 F.2d 987 (3rd Cir. 1986); Geis V. Board of Education of Parsippany-Troy Hills, 774 F.2d 575 (1985); Students of California School for the Blind v. Honig, 736 F.2d 538 (9th Cir. 1984), vacated on other grounds, 105 S.Ct. 1820 (1985); Hendrick Hudson District Board of Education v. Rowley, 458

U.S. 176, 73 L. Ed.2d 690, 102 S.Ct. 3034 (1982); Visco v. School District of Pittsburgh, 684 F.Supp. 1310 (1988).

7. The State Plan of Texas includes Texas Education Code Section 11.10(o)(6). Appendix B: *Right to Education Policy Statement, State Plan.*

8. The local school district has the duty to implement Section 11.10(o)(6) for Bonnie.

> For the hearing-impaired student for whom the ARD Committee has recommended services through a Regional Day School for the Deaf ... . The sending school district remains ultimately responsible for ensuring that a free appropriate education is provided to the student.

19 T.A.C. Section 89.221(f).

> In accordance with Texas Education Code, Section 11.10, local school districts shall have access to Regional Day Schools for the Deaf... . Any student who has a hearing impairment which severely impairs ... shall be eligible for consideration for the Regional Day School for the Deaf subject to the admission, review and dismissal (ARD) Committee recommendations.

19 T.A.C. Section 89.201(a).

> Special education services shall be provided to eligible students in accordance with applicable federal law and regulations, state statutes, and the rules in this subchapter.

Subchapter G., Special Education.

9. The State standard requires the use of methods of communication which will best meet the needs of each individual deaf child.

ORDER

Considering the record, the aforegoing findings of facts and conclusions of law, it is accordingly ORDERED that the reimbursement relief sought by the Petitioner is DENIED.

SIGNED: this 2nd day of August, 1991.

s\ Jed I. Oliver
Special Education Hearing Officer
for the State of Texas

NOTICE TO THE PARTIES

Following the March 3, 1983 decision of the Court of Appeals, Third Supreme Judicial District of Texas at Austin, in Manor Independent School District v. Leachelle N., 647 S.W.2d 70 (1983) and pursuant to the provisions of the Administrative Procedure and Texas Register Act., TEX. REV. CIV. STAT. ANN. art. 6252-13a (Supp. 1982), a timely motion for rehearing to the State special education hearing officer will be required in order to perfect an appeal from the hearing officer's decision to a State district court. The parties should give particular attention to Sections 16 and 19 of the Act, regarding finality of decisions and judicial review.

DOCKET NO. 203-SE-391

BONNIE ANN F. B/N/F)	BEFORE A
JOHN R. AND KAREN A. F.)	
)	SPECIAL EDUCATION
VS.)	
)	HEARING OFFICER
CALALLEN INDEPENDENT)	
SCHOOL DISTRICT)	FOR THE STATE OF TEXAS

SYNOPSIS

Petitioner and Disability:

Auditorily Disabled

Statement of Case:

Petitioner parent, dissatisfied with a total communication classroom environment, unilaterally withdrew the child and placed her in a private school that utilized a strict oral/aural methodology and herein sues for reimbursement for such unilateral placement.

Issue:

Was the placement of Bonnie at the time of withdrawal from Respondent school district an appropriate placement so as to justify removal and reimbursement?

Held:

Placement was appropriate; therefore, no reimbursement.